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THE INFLUENCE OF SOCIALISM ON ENGLISH POLITICS.

SOME few years ago, a well-known English politician and political economist is reported to have said that, whatever might be the case in Continental countries, socialism was impossible in England, and that any socialist propaganda there would prove a ridiculous fiasco. The remark seemed to suggest that insular habit of thought so often attributed to Englishmen, which presupposes an insurmountable barrier between Great Britain and the Continent. But whether that was so or not, the remark was unfortunate in view of the very striking socialistic development which has since obtained in England. Probably no person equally well-informed would venture to make a similar observation at the present time. For good or for evil, the socialist movement has obtained something more than a foothold in England, while British legislation partakes more and more of the nature of quasi-socialist enactments. To so great an extent is this the case that an amiable and estimable peer, Lord Wemyss, recently called attention in the House of Lords to the spread of socialism, and charged both political parties with pandering to it in their legislation. The most eminent English thinker, Mr. Herbert Spencer, has also been moved to take up his parable against socialism in a little volume entitled *The Man versus the State.* And quite recently no less important a person than Sir William Harcourt exclaimed, in the House of Commons, "We are all socialists now." No one supposes that Sir William Harcourt uses the term "socialist" in the same sense as Marx used it or as it is used by any socialist

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party in any civilized country. By socialism Marx meant the collective ownership of the instruments of production; while by the same term Sir William Harcourt probably signifies the regulation by law of the relations between those who own those instruments and those who work at some fixed wage or pay a competition rent to the owners. And no doubt this distinction is real and important. But it remains to be seen whether such an admission of the doctrine of "ransom" as Professor Sidgwick has recently sanctioned in the *Contemporary Review*, or the regulation of rents by the state as in Ireland under the Gladstone land act, will not ultimately tend to that further and more complete socialism which is advocated by the collectivist party. The present paper proposes, however, not so much to discuss this interesting question as to consider briefly the actual course of English political development and to elucidate the present condition of things in Great Britain. Are Lord Wemyss, Mr. Spencer, and Sir William Harcourt correct in their diagnosis, or was the above-mentioned political economist right in saying that socialism was impossible in England?

The word socialism has perhaps merited its claim to be one of the great words of the modern world by reason of the different constructions which may be put upon it — just like the words liberty and Christianity, which also are used in the loosest possible way. The word socialist is used here in its strictest economic sense. A socialist is one who believes that the necessary instruments of production should be held and organized by the community, instead of by individuals or groups of individuals within or outside of that community. There may be infinite differences of opinion as to the way in which that result should be brought about; there may be an indefinite variety of connotations and inferences concerning the bearing of the new economic doctrine on religion, marriage, the family and so forth. The adoption of socialism may involve fundamental changes in the whole structure of our social life; but with all this, for the time, we have nothing to do. Nor can I concern myself with the respective merits of anarchic and collective socialism, as preached, for example, by Bakunine and Krapotkine on the one

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hand or by Marx and Bebel on the other. These are interesting questions but are not relevant to the issue; for Bakunine and Krapotkine believe in collective ownership of the instruments of production just as truly as Marx and Bebel, though they differ as to methods and organization. Nor do I propose to note the conflict between those who would take the socialist commonwealth by violence and those who would introduce it gradually by constitutional methods. The creed of economic socialism is independent of all these questions of methods and tactics, and may be held by men who are at daggers drawn as to ways and means. The socialist, then, for my purpose, is one who would transfer gradually or otherwise, by direct or indirect means, the ownership of the instruments of production (land, mines, telegraphs, railways, machinery, banks of issue) from individuals to the community. And the questions we have now to ask and answer are: Is England becoming in this sense socialist, or is socialism in this sense possible or impossible in England? And further: Have any recent movements helped to bring about any marked change in the course of public thought and of public legislation?

And first we must observe that interference by legislation with "private enterprise" has been steadily increasing in England during the last seventy years. The zenith of the *laisser-faire* theory was attained about the beginning of the present century, ever since which it has declined until it is now practically abandoned. Early in the century England was engaged in the most gigantic of her many wars — a war carried on by a great commercial minister, for preëminently commercial ends. The real character of the struggle between Pitt and Napoleon has been largely lost sight of, owing to a cloud of vague phrases about patriotism, liberty, and religion. No doubt there came ultimately an issue between Napoleonic despotism and European liberty. But Pitt himself was under no illusions. He cared little or nothing for the picturesque corruptions and historical traditions which appealed to the imagination of Burke. Pitt started as a reformer, imbued with the doctrines of Adam Smith, and a reformer he remained in intellect even while he

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was giving his immense talent to the service of reaction. In theories of commercial legislation he was far ahead of any contemporary statesman, and he believed all along in a reformed Parliament and in religious liberty. Pitt never backed up the Continental coalition against France for the sake of "altar and throne." He had a much more tangible object in view, *viz.:* to secure for his country undisputed commercial supremacy. His aim was to complete the edifice begun by William III and the Whigs of 1688 and continued by Walpole and Chatham. One of the chief meanings of 1688 was the transference of the government into the hands of the moneyed class. It was the period of the formation of the national debt and the Bank of England; and under Pitt the classes interested in the national debt and the Bank of England became supreme in the state. The borough-mongers and the rich Indian nabobs possessed themselves of Parliament, and the "old nobility" was swamped with successful contractors and wealthy fundholders. The capital controlled by this class was used by the ideal statesman of the class to secure the supremacy of the class. The policy of *laisser faire* was the special invention of that class.

At the same time a new class, that of the manufacturers, was rising into power. The inventions of Arkwright and Crompton date from the latter half of the eighteenth century, during which period England's great cotton manufacture grew to imposing proportions. Aided by the new machinery, by an abundant supply of minerals, by England's insular position, and by the genius of the people for industry, the manufacturing class became powerful; and those ugly places, the large industrial towns of England, began to grow to an enormous size. The English manufacturers were originally protectionists, as witness the Irish commercial legislation and the general colonial policy which they supported. But as soon as their position was secure, it was obvious that they would become free traders and advocates of *laisser faire;* and the subsequent free-trade legislation of Peel marked perhaps the culmination of their power.

But the reign of *laisser faire* was soon challenged — and why?

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Because of the growth of machine industry, the consequent displacement of labor, and the new discomfort and dislocations which had arisen. The horrible cruelties of the early factory and mine system in England have been laid so fully bare by official documents that any attempt to tell over again the tale of horror is superfluous. The foundations of England's industrial greatness were cemented by the blood of the English working classes. But apart from the cruelty perpetrated, two other results connected themselves with the new era. The question of the "unemployed" arose as the direct result of machine industry; and the tendency of wages towards a minimum manifested itself in the absence of any organization on the part of the workers. Obviously *laisser faire* was an impossible policy; society simply could not hold together on any such basis. The attacks made on machinery by starving weavers may have been very foolish; but the weavers saw clearly that in some way or other the new machines had altered their position, had rendered life harder for the many, and employment more precarious. It was impossible to permit the new industrial relationship to be uncontrolled. Thus English statesmen abandoned *laisser faire*, not because of any abstract theories about the functions of the state, but simply because they were compelled by the pressure of facts. The first of a long series of enactments for the protection of labor was passed in 1802: it was the beginning of the end of *laisser faire*.

But it is commonly assumed that the whole Liberal and Radical movement in England has been essentially a movement having for its watchwords, liberty, absence of state regulation, freedom of contract. Is this so? What may be roughly termed the Liberal movement in England has its origin in three distinct schools. (1) There were those Whigs who adhered to Fox and who regarded with friendly eyes the proceedings of the French revolutionists up till the time of the September massacres, and who even after that date wished well to the French republic. This class was never large, and it was demoralized by the temporary withdrawal of Fox from

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Parliament. (2) There was, next, the small Benthamite school (to use a convenient phrase), of whom Price and Priestly were active apostles, whose doctrines are summed up in Godwin's *Political Justice*, and whose Nestor was the venerable Jeremy Bentham. This school of political thought was clearly affiliated to that of the French *philosophes;* its members were ardent and zealous reformers, thoroughly imbued with the critical ideas of the eighteenth century, and believers in the "perfectibility of the species." (3) There was also the popular school, which derived its main inspiration from Thomas Paine, and whose leaders and orators were Cobbett, Cartwright, and Hunt. This school was of the rough and ready order: its members did not speculate very deeply, but they saw clearly the abuses under which the country was suffering, and they were honestly desirous of improving the condition of the people as well as vehemently opposed to the court, the aristocracy, and the church. If any one man can be said to be the father of popular English radicalism, Thomas Paine is that man: his mark is upon it to-day. All these three schools went to the making up of the English progressive movement of the earlier part of the century. Can it be said that a party thus composed was favorable to *laisser faire?*

The truth is that the movement was of a complex character, having diverse and even contradictory aims. Some of its leaders were mainly interested in getting rid of abuses, others in affirming new political ideas. Some wanted to make a bonfire of old statutes and to abolish laws restricting freedom of speech, publication and worship. The politics of Bentham and Godwin were certainly favorable to that creed of "administrative nihilism" for which Mr. Spencer now stands sponsor. But the popular side of the movement was even then dominated by quite different aims and had a distinctly socialistic tinge. Cobbett inveighed against the fundholders and the debt; Thomas Spence of Newcastle published his able and interesting scheme of land nationalization; Robert Owen was preaching theoretic and practising actual socialism. It is a fundamental error to suppose that English radicalism was originally a new creed as

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to political machinery: it had a social doctrine, however ill formulated. And with respect even to such a writer as Godwin, it must be remembered that his *Political Justice* was written before the effects of machine industry had become visible. Like the French declaration of the Rights of Man, it was not so much a prophecy of the new era as a summing up of the old: it represented the logical issue of a free individualism under simple economic conditions, rather than the necessary political results of the new system of collective industry.

The various groups were united so long as all were equally opposed to Tory rule; but the Liberal reaction of 1830 and the compromising legislation which followed had the effect of breaking up this unity. The Whigs forgot their reforming zeal in the delights of office; literary radicalism of the so-called philosophic order got into the hands of writers like James Mill, who had little else to offer but a series of negations; and the popular radical movement merged into Chartism.

An adequate history of the Chartist movement has yet to be written. In every way it was, as Carlyle perceived, a movement of deep importance. While it put forward a distinctly political programme, it had undoubtedly ulterior social and economic aims. This may be gathered from a study of the speeches and writings connected with the movement, especially those of Ernest Jones and Bronterre O'Brien. It was the only genuine, earnest, serious popular movement in England since the days of the Commonwealth. It was an absolutely English creation, due in no sense to foreign initiative, and it was environed by a quasi-socialistic atmosphere. Its authors desired to gain political power in order to improve the condition of English working-men.

Had the working classes been enfranchised and had no competing programmes been set before them, Chartism would certainly have triumphed, and the subsequent course of English politics would have been widely different from what it has been. But neither of these conditions obtained. The working classes were not in possession of the suffrage, and a new factor came

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into the field in the shape of Cobdenism, or *Manchesterismus*, as the uncouth tongue of Germany has it.

I have said above that, when they felt their ability to compete in the world's market with success, it was natural that the English manufacturers should be friendly to *laisser faire*. That they were so is shown in their support of Cobdenism. The movement, directed with such sagacity by Cobden was essentially a middle-class, business-men's movement. Its triumph signified the supremacy of the manufacturer. Cobden himself, as quoted in Mr. John Morley's biography (chapter 13), asserted that his aim was to make the middle classes absolute masters of the state; and he temporarily succeeded in doing so. That Cobdenism should ever have been regarded as a "popular" movement, that free trade should ever have been supposed to be a "popular" victory, can only be attributed to one of those hallucinations which are stronger and more enduring in politics and religion than in any other departments of human affairs. It is certain that neither the aristocracy nor the working class leaders so regarded it. The latter perceived that their Chartist movement was beaten by the free-trade middle-class movement, — a fact also noted by Emerson,[1] who was sojourning in England at the time, — and they have not recovered their position even to this day. The Cobdenite victory is easily explained. The Cobden school came to the front at a time when the old Whiggism was dying out. It had able men at its head, a simple programme of a highly practical character, and it was able to draw to an unlimited extent upon the immense revenues of the manufacturing class behind it. It appealed moreover to a middle-class electorate. Thus armed, Cobdenism stormed successfully the citadel of liberalism and held it for a whole generation. It is this quite natural (but entirely misleading) identification of Cobdenism with the progressive movement in England which has induced people to suppose that English radicalism means mere absence of restriction or "administrative nihilism." It means nothing of the sort. Cobdenism was an intruder in the line of legitimate succession; and we shall see directly that the

[1] J. E. Cabot, Life of Emerson, II, 527.

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radicalism of to-day is taking up the thread of the Chartist movement.

While the let-alone policy was triumphing in the legislation of Huskisson and Peel and the agitation of Cobden, immense inroads were being made in the theory of individualism by the factory legislation. That legislation was brought about by two causes: (1) the unwearied devotion of zealous philanthropists, chief of whom was the late Lord Shaftesbury; and (2) the attempt of the landlords and the "country party" to retaliate on the free-trade manufacturers. The bitterest opponent of the new legislation was Mr. John Bright, the spokesman of the manufacturers. Peel's personal bias was on the side of the capitalist class, but he was compelled to give way and make terms with the philanthropists. Just as the net result of free trade in corn was to cut many slices off the rents of the landlord class, so, from an economic point of view, the net result of the factory legislation was the cutting of slices from the profits of capital, which under unrestricted competition would have gone into the pockets of the employers, but which were now diverted into the general channels of the whole working community.

Now, for convenience, let me sum up the conclusions hitherto arrived at, *viz.*: that the era of capitalist rule began at the revolution of 1688 and extended with increasing power till after the beginning of this century; that the foreign policy of this era was conducted in the interests of capitalists; that *laisser faire* was erected into a supreme political dogma at the close of the last and beginning of the present century; that statesmen were obliged to abandon *laisser faire* as a working policy; that the reforming party in England, though composed of varied currents, was in the main bent on social and economic as well as political change; that, owing to certain intelligible causes, the main current of this movement was for a time diverted into the channel of Cobdenism; but that, at the very period when the Cobden school secured their triumph, *laisser faire* received a severe check, due partly to philanthropy and partly to political tactics, in the factory legislation. The middle-class doctrine of *quieta non movere* may be said to have lasted till the death

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of Palmerston in 1865. Though Cobden was a bitter enemy of Palmerston in foreign policy, yet in commercial and financial legislation Cobden's ideas obtained during the Palmerstonian era. The first Gladstone budget in 1853, the repeal of the navigation laws, the French treaty, the repeal of the paper duties were all emphatic assertions of the supremacy of free-trade ideas, as was also the abandonment of protection by Disraeli and the Conservative leaders. During this period the working classes were quiescent politically, but the skilled section of them concentrated their attention during this time of political apathy on their trades unions, hoping to accomplish by pressure exerted through them what the Chartists had hoped to secure by political power. It is impossible within these limits to treat of the trades unions; but it may be said generally that it is the Chartist idea and not the trades-union idea which is again coming to the front. The English trades unions have done a useful work for a section of the English working classes; but their task is now mainly accomplished. Within a few years the numbers represented at the annual trades-union congresses have fallen by more than one-half, and there are few of these bodies which are now in a flourishing condition as regards either membership or funds. The culmination of trades-unionism may be dated about 1874, when some of the trades-union leaders first secured seats in Parliament, and when the complete legal recognition of trades unions was wrung from a Conservative government. Simultaneously with the culmination of trades unions among operatives came the beginning of combination among agricultural laborers; but internal quarrels and outside economic pressure have rendered this latter all but powerless. Thus the purely middle-class régime came to an end (the year of Palmerston's death curiously coinciding with that of Cobden), and the period of proletarian pressure began; or rather, to be more strictly accurate, the pressure which had been felt to some extent from without, now manifested itself within the political parties to a far greater degree. The security of the ballot was given to the working classes; legislation on social questions became much more frequent and

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advanced in its tendencies; and, above all, a state system of public education was adopted with the consent of both parties. The so-called Conservative reaction of 1874 was due in a far greater degree to Liberal quarrels and divisions than to any new manifestation of genuine conservatism. That there was really no reaction against state interference was proved by the acts of 1875 providing for artisans' dwellings and for the full recognition of trades unions, by the merchant-shipping legislation of the same year, and by the extension and completion of the system of compulsory education in 1876. The Disraeli administration accomplished very little in domestic legislation; but what it did accomplish was certainly in the direction of public intervention between capital and labor, nominally, if not practically, in the interests of labor.

This tendency towards quasi-socialistic legislation became much more manifest under the Gladstone administration of 1880; for two of the most important measures of the very first year of the new government were severe blows to the *laisser-faire* theory. These were the Irish compensation for disturbance bill and the employers' liability bill. The former measure, it is true, was lost through the action of the House of Lords; but this does not lessen its importance as an indication of the socialistic tendency of Liberal legislation. During the Gladstone régime the functions of the post office were also greatly enlarged by the adoption of the parcels-post system, whereby "private enterprise" has been greatly checked. The electric-lighting legislation and the claim asserted by the government over the telephones also mark the same drift towards collective control and ownership.

What are the functions, then, with which we find the British government invested at the present time, at home and in its Indian dependency? The government has rendered popular education compulsory; it has truck acts to regulate payment of wages, mines-regulation acts, factory and workshop acts interfering at every point with the liberties of the capitalist, adulteration acts, and acts to compensate workmen for injuries due to their employers' neglect. The telegraphs have been

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acquired by the state, and the functions of the post office have been so enlarged that, besides sending and delivering letters, it now despatches telegrams and is a common carrier and banker on an enormous scale. The British state has now 150,000 persons in the direct service of the community in purely civil employment. The municipal bodies have also extended their functions. Municipalities now own public parks and gardens, museums, picture galleries, libraries, baths, washhouses, technical schools, gas and water works, cattle markets, street railways, concert halls, piers, harbors, dispensaries, hospitals, and artisans' dwellings; and in many towns as, for example, Glasgow and Edinburgh, the municipality is the owner of a vast area of house property. By recent legislation, the municipalities are empowered to acquire land to be let by them as allotments to laborers and others. Moreover, under the British government, localities can provide for themselves farms, irrigation works, bathing establishments, and can deal in guano, salt, opium, quinine, *etc.* The state in England at this moment provides, for every one needing them, midwifery, nursery, education, board and lodging, vaccination, medicine, public worship, amusements, burials, and carriage of goods and money. All this of course means that the state, either in its national or municipal capacity, has been gradually absorbing what were private functions; and this under a restricted suffrage, and despite the immense dead weight of individualism left behind by the Cobden school. England is indeed leaving the days of *laisser faire* far behind.

But nothing has helped on the new socialistic movement in English politics more than the Irish land legislation. The late Arnold Toynbee said that by his Irish land act Mr. Gladstone had committed the Radical party to socialism. But Mr. Gladstone has done much more than commit his own party to a new path of political experiment; he has committed the entire community. Conservative statesmen may and do regret this fact, as Lord Salisbury lamented in the House of Lords; but, instead of reversing it, they go forward in the same path. Had the principle of *laisser faire* been maintained, in place of the land

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act of 1881 we should have had the Cobdenite ideal embodied in some measure which would have made the land of Ireland as salable as a ship or a horse. The control by the state would have been relaxed. But by the Gladstonian land legislation the land of Ireland is to-day absolutely under state control. Rent is fixed, not by contract, but by a state tribunal acting on evidence laid before it. Slice after slice has been taken from the landlords' rent, until, by a decree of the land commission, in December, 1887, rent to the extent of hundreds of thousands of pounds sterling was knocked off by one stroke of the pen. This is due to public pressure, to the influence of the unconscious socialism which operates on the minds of the Irish people, and to the pressure of economic fact. Conservatism protests against this innovation, but in vain: it is compelled, when in office, to carry on the same policy, to resist in 1886 and to yield in 1887. This shows that the policy is no mere capricious act, but the joint product of steady popular pressure and hard economic fact. Mr. Gladstone legislated in 1881 as he did because he could not help it: his successors have followed reluctantly in his steps because they could not do otherwise.

Now when Mr. Gladstone brought in his Irish land bill of 1881 he said that his legislation was exceptional and was intended for Irish consumption only. He said just the same of his Irish church legislation in 1869. But Ireland is the Nemesis of the English governing classes. The country which for centuries they ruined has turned and begun to ruin them. Ireland affords a precedent for the rest of the United Kingdom. The disestablishment of the Irish church in 1869 gave an immense impetus to the disestablishment movement in England, Scotland, and Wales. The Irish land movement, which in its origin was of a distinctly socialist character, and the legislation which it has wrung from Parliament have given an even greater impetus to the land movement in these three countries. Land agitations of a precisely similar character to that of Ireland are in full blast in Scotland and Wales. It would take very little to set the Scottish Highlands in a state of active revolt. In Wales tithes are collected by the military at the point of the bayonet.

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Even Conservative politicians admit that "something must be done" in both countries. That "something" will not be Cobdenite "free trade in land": it will be state interference between owner and cultivator. Landlords and clergy will be gradually expropriated, and rent and tithe will be absorbed by the community and appropriated to public purposes.

In England, for various reasons, things do not move quite so rapidly, but the tendency is the same. The land question in England is much more of a town movement than a question of agricultural land, owing to the steady surging of the population into large towns. This brings up the question of public ownership of parks and open spaces and above all the question of ground rents. The feeling of all classes against the great ground landlords of London, who absorb millions of rent without rendering one single service of any kind in return, is growing in intensity every day. When trade was flourishing and wages were high, people did not trouble themselves much about this condition of things. Consequently even John Stuart Mill failed in 1873 to rouse the public mind on the subject of "unearned increment" through the medium of his Land Tenure Reform association. But now that wages are low, work scarce, the numbers of the unemployed swelling every year, competition keener, the struggle for life more and more severe, the old indifference is being dispelled; and were it not that London is so huge and amorphous, and consequently so difficult to organize, the agitation against the ground landlords would by this time have become of an exceedingly formidable character. Discontent against what is vaguely called "landlordism" is being widely felt, quite independent of party ties.

This feeling is producing its effect on both political parties. English politicians as a rule are comfortably ignorant of political economy: they do their work by rule of thumb. We must not expect, therefore, to find any well-considered economic theory obtaining in either party; but what we do find is that the Liberal party has made up its mind to tax ground rents and mineral royalties, to support the extension of municipal allotments, and to apply the principles of the Irish land act in Scot-

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land and Wales. Liberals have lost the land-owning members of their party (who have become either Tory or Unionist) and they are now free to join in the Irish cry against "Landlordism." The party has not yet made up its mind to treat land definitely as public property and to expropriate all private owners, but it is tending that way, and that is the view held by not a few of its most active workers. There can be no doubt that the writings and propaganda of Mr. Henry George produced a distinct impression on the Liberals of Great Britain, though no Liberal convention would yet be prepared to endorse publicly the state appropriation of competition rents. But the old Cobdenite doctrine of free trade in land is manifestly falling into the shade, and the taxation of land values and the interference of the state between landlord and tenant are now fully accepted articles of the Liberal creed. The Conservative party too has, in its so-called Tory-democratic wing, adherents of these doctrines; but the party as a whole is of course less advanced. It will resist these innovations at first, and then, after a severe struggle, will gradually yield and throw overboard its landlord Jonah (as it already has done in Ireland) to save its vessel from the threatening ocean of democracy. At any rate such a forecast seems probable in the light of the history of the last half century.

In the light of this quasi-socialistic movement in the Liberal party, a word on the "home-rule" question may not be out of place. American readers are apt to regard the Irish question as a mere affair of local self-government, a matter of political machinery, and so forth. But the more thoroughly one goes into the Irish question, the more clearly one perceives that this is not the case. That the majority of the Whigs of the last century were friendly to Grattan, while the small Whig residuum of the present day is even more bitterly hostile to the Irish movement than is the Tory party, should afford ground for reflection on the change that has come over the Irish movement in recent years. The movement of Grattan was a constitutional Whig movement, sanctioned by so conservative a statesman as Burke. The present movement is a social movement which

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concerns itself not only with self-government but with property. The fate of a mere political movement in Ireland may be inferred from the collapse of the Young Ireland party of 1848 with its vague aspirations and crude methods. To the political aims of 1848 the founders of the Land League added tangible social and economic aims: they proposed to secure the land of Ireland for the Irish people. Now it is the Whig section in England, combined with what may be termed the rump of Cobdenism, which has most clearly perceived this fact, that the Irish were aiming at social and economic revolution; and it is the representatives of these parties to-day who are the most vigorous opponents of the Irish movement. This was admitted by the ablest leader of the group, Mr. Goschen, in a striking speech delivered at a banquet in London in December, 1886, in which he clearly laid down that he and his friends were combating what was practically a socialistic movement. This, therefore, is the true secret of the vigorous opposition in England to home rule: it is the opposition of the propertied classes. And it is important, as emphasizing this fact, to observe that the Irish movement was the occasion and not the cause of the Liberal split. That split was certain to come in any event. Had the Liberal chiefs definitely decided to take up what was termed the "unauthorized programme" put forward at the election of 1885, and which included the graduated income tax and the municipalization of land, the split would have been even more serious. It was the entering wedge of the socialistic movement which was really responsible for the temporary collapse of the Liberal party. Moreover if we consider, more carefully than English partisans can afford to do, Mr. Gladstone's attitude on the Irish question, we shall see that he really tried to temper the wind to the shorn Whig lamb in a way that the "unauthorized programme" would not have done. For he proposed, first, to pledge English credit to buy out the Irish landlords; and, second, by the institution of a property qualification and a second order, to make the Irish government thoroughly aristocratic in its composition. History will cite the refusal of the landlord and Conservative party to close with Mr.

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Gladstone's offer as a striking illustration of the short-sighted folly of conservatism. Mr. Gladstone would have given a kind of home rule plus lavish compensation to landlords: it is now probable that there will be democratic home rule with nothing more than prairie value. But the dispossession of Irish landlords by an Irish legislature must lead to a consideration of two further questions — the questions, namely, of the laborers in Ireland and of the mortgagees. What will an Irish legislature say to these problems? It is not difficult to see that Irish laborers may fare worse under small farmers than under large landowners; and it is certain that the mortgagees of Irish land will press as heavily on the landlords as the landlords have pressed on their tenants. An Irish legislature would thus find itself face to face with a gigantic social problem, and though there is less conscious socialism in Ireland than in almost any other civilized country, it is difficult to see how an Irish parliament could solve the problem thus forced upon it in any other than a socialistic sense. This then is what the English anti-home-ruler fears: he cares not so much about the mere fact of an Irish legislature (to which indeed at the beginning of the fight several prominent Unionists did not object under certain conditions), as about the legislation which such a body would enact and the precedents it would set for the rest of the United Kingdom. In this connection it may be pointed out that the coercive policy of the Salisbury ministry is not so much directed against the political as against the social movement in Ireland. The members of Parliament and others arrested and imprisoned have been specially those who advocated boycotting and the "plan of campaign." Thus we see that the opponents of home rule are really fighting against social revolution, against incipient socialism; and the most vigorous of these opponents are not the Tory rank and file, but the Whig landlords and the small band of doctrinaire adherents of *laisser faire*.

And now let us consider the *solidarité* between the Irish movement and the new force which is beginning to operate on the English Radical party — a *solidarité* none the less real because quite undreamed of by most Irishmen. The socialist

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movement in England is about eight years old. In 1880 was founded a small body called the "Democratic Federation," which, in 1883, prefixed the word "Social" to its title and became an avowedly socialist body. At the end of 1884, it experienced the inevitable fissure which sooner or later splits all bodies of advanced reformers in twain, and the "Socialist League" arose. A little prior to this, a small number of educated socialists formed the "Fabian Society," which differed from the other two bodies in that its members proposed to adopt the policy of Quinctus Fabius dictator, *qui cunctando restituit rem.* These three bodies are very small; it is doubtful if their numbers amount to a couple of thousand all told; but there is no room for doubt as to the influence they have exerted and are exerting on active politicians and on a section of working-men. While there are few definite socialists in England, there is much unconscious socialism, especially in London; and this is due mainly to the very energetic propaganda carried on in workmen's clubs. Ten years ago individualistic secularism of a hard and unimaginative order reigned in these places; to-day they are pervaded by a more or less socialistic spirit. The change is so striking that none acquainted with these proletarian institutions can fail to recognize it. The working classes of England are not nearly so intelligent or impulsive as those of France; and therefore what socialism there is is vaguer in England than in France and does not prompt to such decisive and logical action. But it is there, and it is beginning to affect the skilled workmen. Though the trades unions are on the whole somewhat conservative, it is noteworthy that for the last five years the address from the chair at the annual congress has been of a more or less socialistic character; while the active socialistic campaign is largely carried on by skilled workmen, such as engineers and compositors. At the congress held this year at Bradford, a resolution was carried by an overwhelming majority in favor of the nationalization of land; another resolution demanded direct labor representation in Parliament; while a resolution favoring an eight hours' working day would have been carried had it not been for certain complications

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into which it is impossible to enter here. Thus we see that the socialistic principle as against the let-alone principle is making way rapidly among English skilled workers. That this is in large measure due to the socialist propaganda may be inferred from the fact that it follows almost immediately on the formation of an avowed socialist organization in England. This is really a case of *post hoc, ergo propter hoc.* In England the function of revolutionary socialism seems to be similar to the function of unitarianism in religion: it has few positive adherents, but it leavens very powerfully the political thought around it.

More important, however, than the resolutions of trades-union congresses is the actual legislation which Parliament is compelled to take up. There is scarcely an eminent politician in either house of Parliament who does not dilate to his audiences on the virtues of self-help; but the same men, when they come to deal with the legislative problems actually before them, are constantly calling into being new state powers, are constantly extending state functions, are perpetually interfering with "freedom of contract," are forever directing the hands of the legislative Briareus towards the multitudinous industries and enterprises which, half a century ago, were left to regulate themselves. Such a chronic state of legislative activity, perpetually increasing, is surely no accident. It points to an ever-growing collective control over the industrial life of the community.

But further, there are problems before England which are likely to be solved in a socialistic sense, and thus to hasten the socialistic development of the country. These are specially four: (1) the large tracts of land going out of cultivation and the consequent perpetual decline in agricultural rent; (2) the rehousing of the great mass of the unskilled working classes; (3) the revelations as to the sweating system recently made before the special committee of the House of Lords; and (4) the question of the permanently unemployed. It is difficult to see how these questions are to be solved on individualistic lines. Even that optimist statistician Mr. Giffen,

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after attempting to prove that people are better off than they ever were, expresses his conviction that "something like a revolution" in the condition of the people is desirable. But such a revolution can be brought about only by the state, *i.e.*, by the people in their corporate capacity. Individual effort cannot rebuild East London and house a million working people as they ought to be housed. Individual effort cannot prevent overtime work in government establishments, on railways, in street cars and omnibuses, and so give occupation to the unemployed. Individual effort cannot take hold of and cultivate the land of England, nor can it prevent the ground landlord from absorbing his "unearned increment" out of the industry and enterprise of the people. It is perfectly obvious that all these problems will demand the aid of the state in their solution, and it is equally obvious that such state action will bring society a very long way on in the socialist direction.

And now let us look for a moment to the attitude of the political parties with regard to the social problem and to their probable respective programmes; and we shall see, I think, that both parties, while repudiating socialism, yet advocate such measures as will lead on to socialism and can be logically defended only on something like socialistic grounds. The Conservative party will rely in the main on schemes of state-assisted emigration, on protection, on the exclusion of foreign labor, and probably on some compulsory insurance scheme borrowed from the Bismarckian system. Although the Conservative leaders fight shy of protection, nearly every one of their followers is a protectionist at heart; and the recent sugar-bounties convention is a sign that even the timid leaders of the party will go some way to gratify their followers. To the exclusion of foreign labor nearly every Conservative candidate in London and the large towns will be committed at the next election. As for the emigration scheme, the people do not take very kindly to it, and all acute politicians will be careful not to commit themselves too far in that direction, and the same may be said of any state insurance scheme. But to these things, in some form, the majority of Conservatives will adhere. And be it observed that each

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and all of these schemes involve collective action for the supposed benefit of the people. The state will do something that the masses may have work to do and bread to eat. In other words, it is the collective, the socialist, not the individualist method which conservatism will adopt.

Much more decidedly socialistic will be the Radical programme. Radicals will not send the people out of the country at the public expense, but will supply public money to settle them on the land. They will propose to tax ground rents and mineral royalties with a view to their absorption by the community. They will municipalize land and nationalize railways. As soon as the organized working-class vote demands it, they will shorten the hours of labor and interfere further with the capitalist in the working of his business. And it is probable that, under the new and almost revolutionary extension of local self-government, they will start public works for the relief of the unemployed. It need not be pointed out that every one of these measures would involve a vast increase of collective authority and would be an immense step in the socialist direction.

The conclusion, then, to which the logic of facts drives any competent and well-informed investigator into English affairs is that in no country, probably, is progress being made more rapidly and more certainly in the socialist direction. When one compares the labor legislation of Great Britain, passed even under middle-class rule, with that of France or Belgium, one feels that the former country is in these matters half a century ahead of the two latter. It is so because the industrial development of England is half a century ahead of that of either France or Belgium, and the great lesson of politics is that legislation is determined by the economic and social conditions of the time. The economic development of Great Britain is further advanced than that of any other country; and therefore it is that Great Britain leads the world in socialistic legislation. And, if it be not a paradox to say so, it is that very socialistic legislation which prevents in England the wilder developments of revolutionary socialism with which the world is familiar in the case of France and Germany. It is rather the orderly evolutionary so-

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cialism of Rodbertus than the more revolutionary socialism of Marx (identical as the doctrines of each may be at bottom) which has a fair prospect of development in England.

One other matter needs to be dwelt upon. Englishmen are rightly supposed, all the world over, to be devoted to individual liberty; and the superficial student of socialism supposes that under it all individual liberty is lost and that every one is merely the agent of a huge central bureau. If this were the only kind of socialism possible, it might be freely admitted that it would have no chance in England. But he is blind to the signs of the times who does not perceive that a vast movement of decentralization is going on in England. The Irish demand for home rule, the cries from Scotland and Wales for some reasonable autonomy, the concessions made even by a Conservative ministry in the local government bill, and the certain extension of that measure which the next Radical government will make — all these are indications that Great Britain is being prepared for a kind of socialism wholly different from the authoritative centralizing methods of Marx, — a socialism consistent with and in fact dependent on an energetic local life and compatible with all kinds of local form and coloring. If, for example, the land in England is made public property, it will not be through a great central rent-receiving machine at Whitehall, but rather through the localities, each of which will be as free as is consistent with the union of the whole. Some kind of centralizing there must indeed be: some kind of uniformity is inseparable from the modern industrial system so far as one can see. And there is no greater monotony or uniformity or absence of individual free play than in the modern factories with which industrial England is crowded. It may well be, indeed, that under some rational socialistic system individual liberty may actually extend in various important directions, even if it should be contracted in others.

The immediate political future of England is exceedingly problematical. It is a period of chaos and bewilderment. The old parties are undergoing vast changes, fundamental questions are being asked, and probably the next few years will exhibit

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rapid, shifting scenes of a kaleidoscopic character. During this time of change the labor party will, unless I am greatly mistaken, take form and develop itself, make and unmake ministries, and gradually acquire more and more control over the springs of government and the sources of national power. The politicians will bid for the labor vote as they have bid for the Irish vote: indeed, it is the startling success of Mr. Parnell which has so profoundly influenced the leading workers and thinkers in the labor ranks. Mr. Parnell has made Parnellites of the Liberal party: we shall see the leaders of both parties anxious before long to do whatever the labor leaders may require.

WILLIAM CLARKE.

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SOME DIFFICULTIES OF PUBLIC BUSINESS MANAGEMENT.

MODERN socialism, in its practical bearings, is not so much a struggle for the extension of state activity as a protest against the uncontrolled power of the capitalist. This fact, when once clearly seen, explains a great many apparent contradictions. It shows why the socialist and the anarchist, in spite of the complete opposition of their theories, are yet found acting on the same side in many political questions. It shows why, in countries like Germany, the socialist leaders themselves are found voting against many of the socialistic measures. They are democrats in the first instance and socialists only in the second. They desire to restrain the power of vested rights rather than to give added power to a state which is already the representative of such rights.

But the protest against the power of capital has an inevitable effect in extending the functions of the state. Modern life demands organized business action. There are two great organizations, either one of which can manage it, — organized capital and organized government. If a business is taken out of the control of one, it almost necessarily falls into the hands of the other. Government officials who desire to extend their functions and influence are not slow to take advantage of this fact. The feeling against the power of capital becomes a means in their hands of extending the power of government. Every abuse of existing business methods, every failure of capital to meet its responsibilities, becomes a pretext for extending state activity. The majority of men see the abuses and feel that something ought to be done. Any proposition for a change is welcome. In a vague way they think that government action means action in behalf of the public. Capital, as Lassalle said, is controlled by a small class, perhaps not more than four per cent of

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a community. The state to him represented the whole community — that four per cent and the other ninety-six also. Whether it ever can do so in actual fact is another question ; it is enough for official socialism that people believe such to be the case. A socialistic measure strengthens the hands of a government on precisely this account. Under a democracy it will secure votes ; under a somewhat absolute monarchy, like that of Germany, it may help the existing authorities against the dangers of popular agitation.

No one can fail to see an increased tendency to have organized business done by public agencies instead of private corporations. Transportation on a large scale has quite generally passed into the hands of the state. America is the only important country where the telegraph is still in private hands. State railroads have ceased to be an exception and are now the almost universal rule in central Europe, and are frequently found in other parts of the world. Nor is the industrial activity of the government confined to these broader lines. The municipalities have generally taken control of the water works and not infrequently of gas works. In short, there has been a tendency on the part of governments to assume the ownership of such industrial monopolies as lay within their reach. No one can tell where this process will stop. The character of large manufacturing industries is now developing in such a direction that they too tend to become monopolies. It is impossible to say whether the same tendency which has brought water works or telegraphs into state control may not extend itself to other lines of business when their character as monopolies becomes equally evident.

Such industries are to-day managed by representatives of the investors. Sometimes a joint-stock company elects its managers, sometimes an independent employer persuades others to entrust him with their capital. In the management of the largest concerns the two methods are usually combined. Part of the capital is subscribed by stockholders who elect their representatives, and these in turn make use of additional amounts of borrowed capital. For the purposes of the present discussion it is of little importance which of these forms prevails. In

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either instance the management of business is obtained by the man who can control the capital and persuade others to entrust it to his hands.

In one sense, this is no new thing. Wherever capital has been used, production has been of necessity directed by the man who could control the capital. The peculiar feature of business to-day is the separation of the investors or capitalists as a class from the laborers on the one hand and the consumers on the other. In the trade guilds of the middle ages, industry was controlled by the possessors of the capital; but those possessors of the capital were themselves the laborers. If they were not themselves the chief consumers, they were at least in immediate personal contact with the consumers, knowing the needs and sharing the feelings of those for whom they produced. The invention of the steam engine did much to change this state of things. It made it impossible for the producer to control the machinery which he used. Factories and railroads were organized on a large scale; their operation and ownership became independent of one another. The joint-stock company was developed as a means of furnishing the necessary capital for those enterprises. With the growth of such corporations came the separation of investors on the one hand from employees and consumers on the other.

In connection with this change, the control of the enterprise was given to the investor as distinct from the laborer. It was necessary to attract capital into these channels of investment in order to secure the benefit of the new methods of production. Such capital could only be attracted by legislation which favored the incorporation of joint-stock companies. Every effort to increase the responsibilities and burdens of the investor or to diminish his control over the enterprise prevented the development of the business. This was seen in the history of the United States during the early years of the present century. Some states tried to shape their legislation so as to increase the liabilities of stockholders in corporations. Massachusetts was a notable example. But it was found that the effect of these laws was to drive capital out of Massachusetts to seek invest-

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ment in New York or other states. The development of the community was retarded. It seemed a less evil to allow freedom of incorporation, with all its possible contingent danger, than to fall behind in the race for industrial supremacy. The competition of the different states with one another in the effort to secure investment of capital thus led to legislation favorable to the uncontrolled power of the investor.

The same sort of competition for investment of capital was seen in a less striking form in the different European countries. It seems at first sight a strange fact that the early corporation law of France and Germany was somewhat more liberal than that of England. Yet this is unquestionably the case; and it is explained by the fact that England had comparatively little difficulty in securing the investment of capital wherever needed, while France and Germany found it necessary to encourage the new industrial order by special inducements to investors.

While this was the motive which guided the development of corporation law in its early stages, it was not by any means the sole advantage which was obtained by the system; nor was it, indeed, the chief reason why that system maintained itself so well. The free competition of capitalists with one another secured incidental advantages to almost every other class in the community. To the consumers it gave the fullest benefit from every new method which could be applied. Improved processes were sure to supersede old ones. The scale of production was enlarged, the prices of the product fell; investors were forced to be contented with the narrowest margin of profit as a means of placing their goods upon the market. The increased sales produced an increased demand for labor, which more than counterbalanced any temporary loss to workmen from the introduction of machinery. The benefit of the improved efficiency of labor, instead of being monopolized by the capitalists, was rapidly distributed among the consumers on the one hand and the employees on the other.

This intensity of competition also furnished a kind of guaranty that the managers of capital should be fit for their positions. The man who possessed organizing talent, or who knew

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how to foresee the contingencies of business in such a manner as to prevent waste of capital and labor, was successful. His competitors who had this power in less degree fell behind in the industrial race. There was a process of natural selection which prevented incompetent employers from maintaining themselves long at the head of large enterprises. The operation of this process was not by any means perfect, but in the long run it proved tolerably sure. The possession of inherited capital might give a young man a start in business; but unless he proved himself competent to manage it, he soon lost his place and its control fell into other hands. There might be temporary loss, but there could not be permanent waste and inefficiency.

The general competence of the leaders selected, and the economy in the use of capital under this system, is brought out strongly by contrast when we look at the history of attempts to manage industry in a different fashion. From the beginning of the century until now there have been constant experiments in what is known by the general name of co-operation; that is, management of industry by the producers or the consumers as distinct from the investors. The majority of these experiments have failed. Especially is this true of productive co-operation, or management by the laborers. The cases where such attempts have succeeded, like those of the coopers in Minneapolis or of similar enterprises in England and France, have been in industries requiring a small amount of capital and little exercise of speculative foresight; industries where workmen could produce for orders without large previous outlay either in machinery or in stock. Nor does it seem likely that such experiments will generally be successful, as long as their most active promoters show so little knowledge of business necessities. Much of what is said and written about the possibility of productive co-operation on a large scale involves at least one of two fallacies. One is the belief in a large fund of undistributed profits now appropriated by the capitalists. The other, which is common to almost all socialistic writers, is that labor itself is the source of value. The practical effect of this error is apt to be disastrous;

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especially would it be so if the co-operators, as is the dream of so many of them, could obtain state help and state credit as a means of starting their enterprise. They claim that it would be easy for the state to borrow money on its own credit and advance it in aid of such enterprises, which may be true enough for the time being; but it is also true that the destruction of capital by wasteful and unproductive management would render the system impracticable in the long run.

Distributive co-operation, or management of industry by the consumers, has had, on the whole, a larger measure of success. Yet even here the percentage of failure is most serious. Against the successful co-operative stores of England and the few that exist in the United States, we must place the large number of failures, soon forgotten by every one except the sufferers, but none the less disastrous on that account. Of the stores founded a dozen years ago by the Patrons of Husbandry in the West or the Sovereigns of Industry in New England, only a small number remain. It is only in a few localities that they have maintained themselves in anything like a permanent career of usefulness. In the history of almost all we see repeated the same mistakes which have been described by Dr. Bemis:

> Very much such a state of things existed as is advocated by some socialists, *viz.*, an industry managed by the votes of a democracy, by far the larger part of which has contributed nothing to the capital stock. Whatever may be the possibilities of such a system, the Springfield attempt [a co-operative store of the Sovereigns of Industry] was a decided and, it would seem, an inevitable failure. Directors were elected and managers and clerks in the various branches of the store were chosen who knew nothing of the business. Carpenters and old employees of the United States Armory were suddenly transformed into managers and clerks of a rapidly growing and little understood business. Whatever economy was attempted was in the wrong direction. One thousand dollars was paid to the manager, but many thought even that too high.

Amid all this failure there have been a few instructive instances of marked success. Perhaps the most striking is that of the Manufacturers' Mutual Insurance companies. In

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insurance, more than in any other business, management by consumers, if we may use that term, and management by companies of investors have developed side by side. Mutual insurance comes under the former head; speculative insurance by joint-stock corporations under the latter. On the whole, the tendency has been for the second method to supersede the first; but in manufacturers' insurance there has been a most decided exception. A number of factory owners, finding that the high insurance premiums were a burden, conceived the idea that they might by proper organization separate their own better built and better managed concerns from others where the danger was greater. They adopted a system of rules intended to lessen the chances of fire. They included in their mutual companies only such shops as would submit to those rules; and they provided for a most efficient system of inspection by which all possible means of prevention against fire should be enforced. It will be observed that their work differed from that of an ordinary insurance company. The latter tried to adjust losses and fix its premium in such a manner as to leave itself the best possible margin of profit. The mutual company, on the other hand, attempted to prevent factory losses, and only secondarily did it make a business of adjusting them. Being formed by voluntary association on the part of the insured, it was able to enforce among the participants a high degree of care and responsibility, each and all feeling a direct interest in the general object of preventing destruction by fire. More than that, the manufacturers' mutual companies have been well managed. Their members have been men whose training led them to see the importance of efficient administration and to select their officers with the utmost care. These companies thus combined in the highest degree two requisites of successful administration: far-sighted general policy and wisdom in the selection of officers.

It will be found that most other co-operative enterprises which have succeeded have shown in some degree the combination of both of these elements. The co-operative stores in England obtained their first impulse toward success from

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the adoption of the cash system in their transactions; a policy which had previously not prevailed in England and which, with the English conservative methods, could only be successfully carried out by the voluntary action of the buyers. They thus had the same kind of advantage which the manufacturers' mutual insurance companies enjoyed in this country. Add to this the fact that the managers were, on the whole, well chosen, and that their business was one which lent itself readily to democratic management, and we see a sufficient reason for the success of distributive co-operation in England. In America, on the other hand, where the cash system had prevailed to a much larger extent in ordinary mercantile transactions, there was no such advantage to be gained in general policy by the co-operative stores. Their career was thus usually a disappointment, which was often changed to actual disaster by the incompetency of those who were chosen to manage them.

From the history of co-operation two facts can thus be brought out which will be of importance in their application to government control of industry. The conditions of success in management of industry by the consumers are, first, the adoption of improved methods of business policy, and second, the assurance of wise administration by responsible officials. Both must be combined to assure the survival of a co-operative enterprise. In like manner, both must be combined to assure the industrial success of a state enterprise. Economical administration by wise officials is good as far as it goes; but, unless it is combined with improvements in policy, it constitutes no reason for a change of system. On the other hand, liberal policy without wise administration is almost certain to result in waste of the resources of the community. Neither advantage by itself is sufficient. One must be obtained without sacrificing the other.

As long as there was actual competition among investors, it was hard for the government to hold out even the promise of any such improvement. Competition as already described seemed to insure wise policy and sound administration side by side. But as industry became more complicated, it was

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found that the practical results were not quite what had been expected. Large business, concentrated in a few hands, of itself made competition difficult. It gave the directors a temporary monopoly. Competition might prevent them from exacting too high prices in the long run, but it did not prevent them from making unfair prices at certain places or certain times. Each new industrial development tended to increase this monopoly. Factories became larger, credit was extended, transportation systems were consolidated. Every such extension made it harder to find the necessary capital to enter into competition on equal terms. Control of advantageous sites or of valuable patent rights still further increased the monopoly, and made the managers of capital less directly responsible to the community.

If, on the other hand, in spite of all these things, a competing establishment was started, the result was by no means an unmixed good. Prices were now forced down to an unnaturally low level. Where competition was active, they barely paid operating expenses, without providing for maintenance or interest on capital. If such competition existed at some points and not at others, there was serious discrimination between different sections of the community. If it existed everywhere, the loss of the expected profits prevented employers from meeting their obligations and led to financial ruin. At best, there was almost always a waste of capital where several concerns tried to serve a community which could be more economically supplied by a single management.

In this way almost all the good results of free competition were rendered uncertain. As long as there was a monopoly, the community had not the assurance that prices would be low. They could not feel certain that the best processes would be adopted when the owner of a sweeping patent right could block the way against further improvement. They could not be sure of steadiness of prices or of economy in the use of capital. Worst of all, there was great danger that the wrong leaders of industry might be selected instead of right ones. Large enterprises in many instances assumed a speculative character

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which brought reckless instead of conservative management to the front. Men worked for the present instead of the future. They sought to make money for the time being, at the expense alike of the community and of the investors, instead of establishing their business on a permanent basis for the best advantage of all parties concerned. These evils have been most conspicuously seen in railroad management, simply because consolidation and monopoly have developed most fully in railroad business. The same tendency is visible in every other enterprise employing large capital under concentrated management. Each new combination or trust, whatever its temporary justification may be, creates a wider possible divergence between the theory of free competition and the practice of the business world.

This change has re-opened the question of state ownership. When a private enterprise can, without immediate restraint from competition, adopt a policy which may hurt the community, a government has so much the better chance to show an improvement in this respect. Every discrimination from place to place, or fluctuation from time to time, gives added force to this demand. And when, besides this, the old system affords no apparent assurance against waste of capital or irresponsible leadership, the movement towards state socialism becomes almost overwhelming.

The advocates of state management of industry are able to point out, not merely the great evils of the existing system, but many cases, especially in European countries, where those evils are apparently avoided. They can show instances of wise and economical administration by government officials. They can also show how the state has adopted a different line of policy from that pursued by private individuals and has been apparently successful in so doing. The argument at first sight seems to be without a flaw. But what the advocates of state ownership really fail to show is the combination of liberal policy and wise administration in the same instance. This is a damaging omission. As far as it exists, it renders the argument for state management of industry totally inconclusive. However

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often the two advantages are found separate from one another, they are rarely seen together. Successful administration is found, but without the more liberal policy which is the main argument for government activity. Liberal policy is sometimes found, but is almost invariably accompanied by mistakes in administration.

The first alternative is seen in much of the state enterprise of Europe. Wherever we have a taxpayers' government rather than a popular government, officials will seek to do their work under a conservative business policy, and will be held responsible for so doing. Instances of wise management in this respect are by no means rare; but they are far from furnishing the desired result, either to socialists or to the more moderate advocates of government control.

Let us take, in the first place, the case of gas works, where the argument in favor of municipal ownership is familiar to the American public from the strong and able presentation of Dr. James. Most of the facts on which his monograph was based are taken from England; only three instances of American municipal management being cited, one of which, at least, was most notoriously corrupt. His commendation of English municipal management in this industry is probably well founded; but there is not so much to justify his implication that it gives cheap gas. Yet this is a most essential point in the whole case. If it were once clearly brought before the reader that the gas works whose success is thus shown had not given cheap gas, the force of his argument would be greatly weakened. Now without going into the detail of the question, let us quote from an article on "Municipal Debt and Local Taxation" in the *Edinburgh Review* for April, 1888. The writer is by no means an advocate of *laissez faire*, nor is his line of thought one which gives him any interest in distorting the facts in either direction.

> The Parliamentary returns of gas and water works are too imperfect to allow of comparison between the cost of municipal and of private management in the case of these improved industries. It is at all events open to question whether the disadvantages of municipal management

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do not considerably overbalance the advantages. Town councils and sanitary authorities are destitute of the valuable experience acquired by the directors of the private undertakings. Amid the many calls on their time they have little opportunity of acquiring such experience. In their natural anxiety to obtain a profit which will result in the reduction of the rates [*i.e.* taxes] they have as much temptation as the directors of the companies to keep up their charges, *and they do, in fact, usually keep them very high;* and the wholesome check on such charges which it is one of the functions of law of an ordinary local government to impose, is absent when the consulting bodies themselves become contractors for supply. While then the capital invested in these works is partially self-supporting, and cannot be all regarded as adding to the burden of debt, there is good reason to conclude that the general wealth of the country is diminished, as to its earning power, by the transfer of gas and water works to the local authorities.

This is of course only an opinion, but it seems on the whole a more impartial and trustworthy opinion than those quoted by Dr. James. In any event, the facts with regard to economy, public and private, of gas works, are in rather incomplete shape, owing to the enormous difficulty of comparing either prices or service in different localities. Let us pass to another industry, which may be taken as a type of those managed by the general government as distinct from municipalities, and where the returns are at once more complete and more valuable for comparison. We refer to the case of railroads.

Government railroad enterprise has passed through two stages. Down to about 1873 it was usually managed in competition with private railroads. In some countries this remains the case at the present day, except so far as pooling arrangements have rendered such competition illusory. Under such circumstances, the differences between the management of the government roads and that of its private competitors is usually slight. State railroads are administered with a view to their financial results. They are run on business principles in the narrower sense of the term. They have the same stimulus to efficiency which is felt by private lines; but they also are liable to the same abuses in the way of discrimination in

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rates, and they usually carry such abuses quite as far as their private competitors. Such facts are clearly shown by every investigation and are fully acknowledged by the advocates of state ownership. Prince Bismarck himself, we believe, referred in one of his speeches to the time "when our state roads were simply private roads, owned by the state." An administration will not be willing to lose money on its own roads when private competitors are making money. The latter have, to a large extent, the power of dictating the policy of the former. To make state railroads independent, it is necessary to have state railroad monopoly.

When this is once secured, many of the evils of unrestrained competition are avoided; but they are avoided in virtue of the monopoly rather than on account of the government ownership. There is comparatively little local discrimination, because there is little inducement for it. Rates are arranged in more systematic schedules, because the disturbing elements are avoided. But the general policy of the state railroads, under such circumstances, instead of being more liberal, becomes less so. Deprived of the stimulus of competition, they cease to extend their facilities. They make a good profit, but it is by the avoidance of anything like unprofitable business. Instead of doing more for the people, they actually do less.

Let us take a few instances for comparison, not so much in the matter of rates, for this is a question where the different traffic conditions and different business conditions of the separate countries are a disturbing element, but in the matter of service actually rendered.

First, as to its amount. It will be found that on the state railroads of Germany the train service per head of population is less than half what it is in Great Britain, and little more than one-third of that in the United States. This fact, so far from being explained by the denser population as compared with America, is rendered all the more remarkable on this account; for a comparison between different parts of the United States will show that the denser population should have more *per capita* train service instead of less. The less adequate service is the

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price paid for the adoption of a monopoly with a system of schedule rates based on other than business principles.[1] The German government makes a profit on its roads at rates of carriage which are in some instances apparently very low, but it does it by refusing to do unprofitable business. It secures economy, not in connection with the popular advantages which are ordinarily expected from state ownership, but by sacrifice of them. Any person having so complete a monopoly as to choose what business he will do, can make a satisfactory rate of profit by the exercise of ordinary economy; but the failure to develop business is a most serious price for the community to pay.

This absence of development is thrown into still clearer relief by some investigations of Mr. T. C. Farrer with regard to German and English train service.[2] These investigations show

[1] It should be said in fairness that France has little more *per capita* train service than Germany. The smaller amount is the result of the monopoly and the schedule rates rather than of the government ownership as such. All that it proves is that German government ownership has sacrificed much of the advantage that we have attained in America in connection with the somewhat unrestrained use and abuse of free competition. See *Bulletin de l'Institut international de statistique*, III (1888), 2, p. 31.

[2] Published in a letter to the London *Times*, dated October 18, 1887.

—	Mileage distance by shortest route.	Number of Trains.		Average time per train, all routes.		Speed in miles per hour.		Third-class fare, in peace, per mile.	
		1881.	1887.	1881.	1887.	1881.	1887.	1881.	1887.
				h. m.	h. m.				
Leeds and Edinburgh	211	18	20 (all 3d class)	6 13	6 6	35.7	36.3	.90	.90
Hamburg and Berlin	177½	15	14 (6 not third)	6 39	6 40	30.3	30.3	.84	.84
Briston and Newcastle *	297	11	13 (all third)	11 50	10 30	25.	28.3	.98	.98
Cologne and Magdeburg	271	12	12 (4 not third)	10 11	10 12	27.8	27.7	.95	.95
Edinburgh and Aberdeen	126	18	19 (all third)	5 57	5 26	26.9	29.4	.92	.92
Cologne and Frankfort	138	16	16 (8 not third)	6 8	5 49	22.5	23.7	.76	.84

* Not including nine trains *via* London.

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that the development in railroad service in Germany, beginning with the year 1881, when the government control of the railroad systems became tolerably complete, has been in some respects at an actual stand-still. While the English railroads owned by private companies, with the moderate remnant of competition which still remains, have been increasing their service without increase in their fares, the German service which, at the beginning of the period, was not equal to the English, has tended slightly to decrease, and the fares on one of the routes compared have actually risen. It will be observed that the routes are selected with scrupulous fairness; some of the best services in Germany being compared with what are very far from being the best in England. In the light of these figures, we can agree with Mr. Farrer in saying:

> It is a pretty clear proof that as regards passenger business, though there is always at first an apparent harmony in unified management with reference to local train connections, joint stations and other similar details, the real advantage in getting about a country, to wit, quantity and speed of trains, is neglected, and routine takes the place of elastic administration.

This comparison is developed with the same general result in other respects, to which we have no room to do justice by full quotation.

As long as government is managed by representatives of vested interests, whether property owners or others, state ownership of railroads has not provided a substitute for the stimulus of competition. As was said by the Italian commission a few years ago, the state is more apt to tax industry than to foster it, and in so doing it is more omnipotent and less responsible than a private corporation.[1] Such is the almost inevitable result of government monopoly. Even in those

[1] The candor of the conclusions of the Italian commission has been questioned by Mr. Simon Sterne (*Quarterly Journal of Economics*, July, 1887); but inasmuch as the evidence brought forward by him is anonymous, and is confessedly that of parties engaged in a scheme to overreach the government, it will hardly be considered as weighing against the responsible statement of a body of men known throughout Europe for their intelligence and their character. It was somewhat surprising that

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private enterprises which have become most fully concentrated, there is always some remnant of competition, actual or possible, which stimulates them to improve. The effect of government monopoly is to take away this possibility. The economy which they seek is economy in use of their old plant and old methods; not the profounder economy of serving the community liberally, even at an actual temporary loss.

On the other hand, there are unquestionably instances, even in the narrower sphere of industrial enterprise, where government has sought to pursue a wiser and sounder policy than private companies, and has taken broader public interests into view. The case of telegraph administration in England is an instance in point. About twenty years ago, the English government purchased the telegraph lines from a number of independent corporations which had hitherto served the public more or less indifferently. There were at first serious losses. Afterward a better showing was made, and of late the rate of telegraph service in England has been so greatly reduced as to form a most unquestionable advantage to large sections of the community and give a strong argument to the advocates of a government telegraph in the United States. Additional weight has been given to this argument by the short-sighted policy of our telegraph and telephone companies. The Western Union has in times past not been wise enough to preclude competition by reducing rates, but has accumulated a surplus which formed a positive temptation to the building of parallel lines. The Bell Telephone company, by its control of patents, has positively stood in the way of certain improvements; preventing the country from utilizing the progress of invention for fear that some of the corporation's old plant would not be used up. In each instance the evils of monopoly have been seriously seen and felt, and have turned men's minds in the direction of

a lawyer of Mr. Sterne's high reputation should have asked for a re-opening of the case on a basis like this. It was still more surprising that he should ask that the responsible evidence should be coolly set aside in favor of the irresponsible. Under the circumstances, I have no hesitation in giving the conclusions of the commission as on the whole representing the most impartial as well as the most careful investigation of the subject.

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government ownership. The case of England is cited as an example for us to follow with advantage. But a careful investigation of the facts seems to show that the telegraph economy of the British government is certainly no better than that of the Western Union, and probably not nearly so good; and that the cheap telegraph service of England is of the nature of a drain upon the public treasury for the benefit of the comparatively small number of persons who use the telegraph. Detailed comparison of expense per station in England with that in the United States shows a decided balance in favor of the Western Union. Expense per mile of line in England is more than three times as great as with us. It is not by better economy than our own that the English government has cheapened telegraph service. It has done so by not trying to pay interest on capital; which practically amounts to taxing the people for the sake of those who send telegraph messages. Figures which are now brought forward show that this tax is probably greater than has been at some times supposed. It is strongly urged — we cannot say exactly with what degree of proof — that the English telegraph accounts have been so managed as to conceal a much greater deficit than they actually admitted.

At the time when the telegraph was purchased by the English authorities, Mr. Jevons called attention to the dangers connected with the control by government, and especially by a popular government, of any industry involving large expenditures on capital. The matter comes up in this way. Any enterprise like a railroad or telegraph, a factory or gas works, spends some part of its receipts for wages and materials, other parts for repairs, and others again for new construction. The profit or loss is estimated by deducting from the gross earnings the amount spent on wages and materials and in ordinary repairs of plant, but not that spent for new construction. Now the line which divides repairs from construction is a very narrow one. With the best will, it is not always possible to locate it accurately. The temptation is to make the apparent profit larger by charging too little to repairs and too much to capital account; that is to say, by borrowing at the expense

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of the future for the sake of apparent present prosperity. Under anything like party government this temptation is vastly increased. It is a popular thing to make low rates and show profit in spite of it; and the easiest way to do this is by arranging the accounts in such ways as to make that profit at the expense of the future. If the resulting burden falls on a future administration, the mere party leader is perhaps all the better satisfied. If it can be taken out of a present surplus revenue, it forms a most welcome pretext for so doing. The experience of the United States with enterprises involving expenditure of capital shows how dangerous it is to give such power to officials under a partisan administration. Some waste is inevitable; the amount is usually large. If in the telegraph service of England, which has so long been held as a model, we do not find as good economy as in the much-abused Western Union, what shall we expect in the average business enterprise of popular government as compared with the economy in private hands?

Instances of liberal policy with doubtful economy on the part of government are so familiar that it is hardly necessary to multiply examples. If a state official is not held to the commercial standard of business success in the narrower sense, there seems to be no check upon waste. But on the other hand, as already shown, if commercial success is made the chief standard, there is no inducement to a liberal policy, but rather the reverse. Perhaps the most fundamental difficulty of government business is the lack of any automatic means of combining commercial economy with commercial liberality. The private company must be managed with a certain amount of economy, or it will lose its capital; it must be managed with a certain amount of liberality, or competitors will come in and drive it out of the field. Where any remnant of competition exists, this last-named check upon its policy is distinctly felt. Whether it is worth while to adopt an improvement, to make lower charges, or otherwise to enter upon more liberal policy, is determined by the commercial standard. The standard may not always be a just one, but it is fairer than anything which

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can be applied to control the industrial enterprise of a government managed solely in the interest of the taxpayers. On the other hand, it is far less dangerous in its ulterior consequences than any attempt to serve various sections of the public in total disregard of expense.

Let it be observed that this is not a general objection to all government authority, but simply to its extension in certain lines of industrial enterprise. In lines less strictly industrial, there may be and are many cases where public policy demands an exercise of government activity, regardless of expense. With increasing population and increase of contact between one man and another, there is an increased necessity for common police regulations which can only be enforced by government. No industrial enterprise has the necessary power of compulsion behind it. In matters of public justice or public health, not to speak of many other somewhat more doubtful cases, a single exception may vitiate the whole result sought. The voluntary action of nineteen persons in providing good sanitary arrangements may be powerless to prevent an epidemic if the twentieth is allowed to do as he pleases. Nothing short of compulsory action can meet the difficulty. The matter of policy is decided on other than business grounds. Cases like this lie outside of the industrial sphere in its narrower sense. They are as clearly within the province of government as matters of the ordinary business of daily life are clearly beyond it. And, on the other hand, there are cases like the lighthouse or hospital service where advantage is sought by the community as a whole, but where no private business enterprise could possibly collect the necessary remuneration. It would be difficult to take toll from the ships which were not wrecked, or from the families for which the burden of death was saved. But where there is an opportunity for anything like voluntary action on the one hand, combined with a chance of collecting a return for the service rendered on the other, the dangers of government management usually outweigh its probable advantages. It would of course be wrong wholly to exclude its possibility, even in such cases. There are matters like docks or water works where the natural

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monopoly is such as to be a dangerous power; where the chance for differences in policy is very great and the chance for bad economy comparatively small. In such cases there is rational ground on which the advocate of state ownership may stand. But where the monopoly is an industrial rather than a natural one, and where government management is sought on account of the complexity of the organization and the individual abuse of organized power in private hands, the facts hardly warrant us in expecting good from the change. The case of the state socialists is not proved by the mere existence of serious abuses under the present system. It is not proved by showing that some of those abuses have been avoided by government action in one case and others in another. It must be shown that there is some practical means of combining liberal policy with wise administration. In the majority of instances this proof is not even attempted. The analysis of cases which we have given will show how strong is the presumption against it in many questions now most actively debated. Until the advocates of state socialism can make good this deficiency in their argument, their attacks upon the existing system must be regarded as criticisms of detail, to be remedied by efforts at detailed control, rather than as grounds for the radical change of system which they thus so strongly urge.

ARTHUR T. HADLEY.

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THE LEGALITY OF "TRUSTS."

IN the preceding number of the QUARTERLY certain important aspects of "trusts" were considered.[1] It is the object of this paper to consider solely the question of their legality.

It is important at the outset to state the nature of a "trust." The term is an unfortunate one, since it is in no respect descriptive of the subject at issue. A trust is in general simply the case of one person holding the title of property, whether land or chattels, for the benefit of another, termed a beneficiary. Nothing can be more common or more useful. But the word is now loosely applied to a certain class of commercial agreements and, by reason of a popular and unreasoning dread of their effect, the term itself has become contaminated. This is unfortunate, for it is difficult to find a substitute for it. There may, of course, be illegal trusts; but a trust in and by itself is not illegal: when resorted to for a proper purpose, it has been for centuries enforced by courts of justice, and is, in fact, the creature of a court of equity.

To solve the questions now to be considered, it is necessary to look deeper and to consider the purpose for which the trust is created. The trust is a mere instrument — the means to an end. The real inquiry, accordingly, is whether the *end* sought to be accomplished, through the medium (either wholly or partly) of a trust, is a lawful one.

To reach a correct result upon this point, we must resort to the common law of England, which is adopted in this country, sometimes by constitutional provision and at other times by statute, in each of the states of the Union (except Louisiana) as the basis of its law. True, the common law, as thus adopted, may be changed by state legislation not forbidden by the constitution of the state or by that of the United States. If the

[1] George Gunton, The Economic and Social Aspect of Trusts, POLITICAL SCIENCE QUARTERLY, III, 3 (September, 1888).

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conclusion should be arrived at in the course of the discussion that the object for which the so-called trust was created is lawful, a grave question will arise whether under all the circumstances of the case, hostile legislation will be constitutional.

The various matters to be considered may be grouped under the following heads:

I. Is the object sought to be accomplished by a "trust" legal at common law, either (*a*) by agreement of individual producers, not acting as stockholders in corporation, or (*b*) by agreement of stockholders?

II. If the end be legal, how far will it be possible for a state legislature to prohibit it?

III. What is the power of Congress to legislate upon the subject?

I.

At this stage of the discussion, the real inquiry is as to the lawfulness of an act or a contract in restraint of trade. The inquiry assumes two phases. What, in the first place, is its validity as between the parties to it? The other (and at the present time much the most important) inquiry is as to its lawfulness as a matter of public or *criminal* law. This last topic will be considered first in order.

The rules of the early common law upon this point are uncertain and obscure. One reason of the uncertainty is that a very early English statute enumerated various acts of this sort as criminal offences, so that while it remained in force prosecutions could be and were rested upon the statute without any legal inquiry into the rules of the common law. It appears to be the better opinion that acts and contracts in restraint of trade were not criminal offences unless made or committed with intent to injure the public, as for example to raise the price of provisions. The view of the courts will be most readily understood by referring to the statute (5 and 6 Edward VI, cap. 14) passed by Parliament in 1552, and the decisions under it. The preamble to this statute refers to the prevailing uncertainty upon the subject, declaring that existing statutes, so far as they provided

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for the subject, were substantially a dead letter. It then proceeded to classify offenders in this direction into three classes, *viz.:* "forestallers," "regrators," and "engrossers." Within these classes, one variety of forestallers was nearer than any other to the cases now under consideration, *viz.:* such persons as were guilty of making any motion by word, letter, message or otherwise to any person or persons for the enhancing of the price or dearer selling of any goods, or "dissuading, moving or stirring any person or persons coming to a market or fair to abstain or forbear to bring or convey any merchandise *etc.*, coming by land or water towards such market to be sold, from being brought or conveyed." Though, as has been said, this case somewhat resembles the object of a "trust," it is by no means identical with it, since a trust for the most part aims to prevent the overproduction of merchandise.

A casual perusal of this statute of Edward VI will show that it was conceived in the most narrow and illiberal spirit. Among other things, it prohibits contracts for the purchase of goods before they arrive at the place of sale. So, for example, one could not purchase food or "dead victual" and sell it again in the same market or within four miles of it without being stigmatized as a regrator, though he was permitted to re-sell living animals fit for food if, after purchasing them, he kept and fed them for five weeks on his own ground. The offence of engrossing consisted in buying large quantities of food *etc.*, with intent to sell again. The most extraordinary clause in the statute is found in the eighth section, providing in substance that any farmer buying grain for seed and having on hand sufficient for the purpose must at the same time bring to the market of his own grain an amount equal to what he buys, and sell it there if he can. We have here, manifestly, a rude attempt to equalize the amount of grain for sale in the market. This rule is enforced by a severe clause of forfeiture. In general, the punishments for violating this absurd statute were sharp and severe: a conviction for a third offence was punished by exposure in the pillory, forfeiture of all goods and commitment to prison during the King's pleasure.

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Subsequent legal opinions of text-writers and decisions of courts rest largely upon this statute.

Hawkins, who is a writer of authority, maintains the view that an *endeavor to enhance* the common price of merchandise is a criminal offence by the rules of the common law. He cites little, if any, authority for this statement, and one of his leading instances is that of a rich man engrossing into his hands a whole commodity with an intent to sell it at an unreasonable price, thus making intent a prime ingredient in the offence. He cites an early case (in the time of Charles I) to maintain the proposition that forestalling and kindred acts constitute an offence at common law. The case cited appears upon examination to be framed upon the statute of 5 and 6 Edward VI, already referred to; and although the case was argued it does not appear to have been disposed of by the court.[1] Hawkins then goes on to consider the statute at much length. His whole discussion leaves the impression that there is little, if anything, to be said as to the common law.[2]

A word may be added as to the opinion of Lord Coke. He also expresses the view that forestalling and kindred acts constitute a crime at common law. Most of his references, like the case cited by Hawkins, are to various statutes enacted in the progress of the law. Moreover his distinctions are quite whimsical and unsound, considered from any point of view but that of arbitrary statutory enactment. Thus he confines his view to the case of "victuals," and these must be of necessary and common use. It is no offence, for example, to engross apples, as they are rather of pleasure than of necessity; and the same remark is made of plums, cherries, and other fruit. It is in his view illegal to sell wheat in sheaves before it is threshed and measured, as by such sale the market might be forestalled.[3] It ought to be added that the book of Coke's *Institutes* in which this matter is found (the third) has by no means the high legal credit accorded to his commentaries upon the law of real estate, and is of doubtful authenticity.

[1] King *vs.* Maynard, Croke Charles, 231.
[2] Hawkins, Pleas of the Crown, chap. 80, Lond. ed. 1739.
[3] 3 Coke's Institutes, chap. 89.

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It may therefore fairly be said that, when these great legal writers, Coke and Hawkins, left this subject, the law concerning it was in an unsettled and chaotic state, while the legal distinctions asserted were childish and without any sound foundation in the rules of political economy.

The judgment of Chitty, quite a modern writer, is greatly to be preferred. After reviewing the old authorities, he says: "*Quære* whether in all cases it ought not *now* to be averred and proved that the defendant intended to injure the public." He uses the word "now," because the statute of 5 and 6 Edward VI had been repealed, and he was looking at the whole matter from the common-law point of view. Other passages show that his view was that bad intent must be alleged and shown in order to make an indictment hold water.

This subject received extensive judicial consideration at the beginning of this century, long after the time of Coke and Hawkins.[1] The case of Rex *vs.* Waddington was a *common-law* case, the statute of 5 and 6 Edward VI having been repealed.[2] There are, in the volume cited in the note, two cases involving the conduct of Waddington. The charge against him, in substance, was that wickedly *intending to enhance* the price of hops he had, in the presence of hop planters and others, declared that the existing crop of hops was nearly exhausted and that, before the hops then growing could be brought to market, the existing crop would be exhausted, and that his intent was by such reports to induce persons then present and dealers in hops and having large quantities of them for sale to abstain from selling them for a long time, and thereby greatly to enhance the price of hops. Similar acts were set forth in later clauses of the indictment, but the bad intent was alleged in all of them. The great question was then debated whether the facts as stated in the indictment disclosed any common-law offence. One of the questions was whether hops were "victual" or an article of food. The court said that though hops

[1] See the case of Rex *vs.* Waddington, 1 East, 143 (A.D. 1801).

[2] It was repealed by 12 Geo. III, cap. 71 (A.D. 1772). The old rule had been modified by 15 Chas. II, cap. 7.

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were at one time deemed poisonous, they had then become one of the necessaries of life and accordingly within the spirit of the law against forestalling, *etc.* The whole discussion turned upon the point whether the price of *food* had been interfered with. It seems to have been conceded that the whole subject of forestalling applied to "victual" only. The court having decided that hops were "victual," then came the question whether the indictment disclosed any common-law offence. On this point the Chief Justice said :

> Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing, with a view of afterward dispersing the commodity which he collected in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shows plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on *with a view to enhance* the price of the commodity, to deprive the people of their ordinary subsistence or else to compel them to purchase it at an exorbitant price, who can deny that this is an offence of the greatest magnitude? . . . Now this defendant went into the market for the very purpose of tempting the dealers to raise the price of the article, offering them higher terms than they themselves proposed and urging them to withhold their hops from the market in order to compel the public to pay a higher price. What defence can be made for such conduct, and how is it possible to impute an innocent intention to him? We must judge of a man's motives from his overt acts, and by that rule it cannot be said that the defendant's conduct was fair and honest to the public.[1]

There are further remarks in the opinions of the court showing that in its judgment it had in view the protection of the laboring classes from intentional efforts of speculators to enhance the price of provisions. From this extract it is very plain that the court, speaking through Lord Kenyon, held that the offence of forestalling, *etc.*, applied simply to the necessaries of life ; that hops belonged to that category ; that there must be *a clear intent* on the part of an alleged offender to enhance the price of the article ; and that this intent may be inferred from his acts.

[1] 1 East, 157, 158. Also Rex *vs.* Waddington, 1 *Id.* 167.

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It is settled by the highest authority, in a later decision, that the offences of engrossing and regrating were at common law confined to the necessaries of life.[1] We say regrating, but it is very doubtful whether any such offence ever existed independent of the statute of 5 and 6 Edward IV, already cited.[2]

About the time that this old statute was repealed, Adam Smith was lending his powerful aid to weaken its hold upon the public mind. He had compared the laws against forestalling, *etc.*, to those against witchcraft. The passage is quoted here since it produced a great effect on the English public mind. He says:

> The popular dread of engrossing and forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them, than those who have been accused of the former. The law which put an end to all prosecutions against witchcraft, which put it out of any man's power to gratify his own malice by accusing his neighbor of this imaginary crime, seems effectually to have put an end to those fears and suspicions, by taking away the great cause which encouraged and supported them. The law which would restore entire freedom to the inland trade of corn, would probably prove as effectual to put an end to the popular fears of engrossing and forestalling.[3]

Lord Kenyon, when he wrote the opinion in Rex *vs.* Waddington already cited, was familiar with Smith's views, and endeavored to draw a line which the court could uphold.

The same general question came up in the case of King *vs.* Webb[4] and others in 1811. Lord Ellenborough, who (as Mr. Law) had argued for the defendant, Waddington, the case al-

[1] Pettamberdass *vs.* Thackoorseydass, 7 Moore P. C. Cases, 239, 263 (A.D. 1850). The judges holding this court were of the very highest ability, including Lord Langdale, Lord Wensleydale and Dr. Lushington. See the remarks of the court on page 263 of the report.

[2] King *vs.* Rusby cited in 2 Chitty, Criminal Law, 527 *et seq.* Also in 2 Blackstone, Comm. (Sharswood's ed.) note 10 to page 158. In this case the members of the court were equally divided, and though the defendant was convicted, no judgment was ever passed upon him.

[3] Smith, Wealth of Nations (Thorold Rogers' ed. 1869) II, 111.

[4] 14 East, 406.

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ready cited, was then Chief Justice. The question arose upon an indictment under the terms of the statute of 6 George I, cap. 18, secs. 18 and 19. This act was passed after the notorious South Sea Bubble, and is known as the "Bubble act." It declared the then existing practice of making subscriptions for commercial undertakings *without an act of incorporation*, and making the certificates of subscribers transferable, to be a common nuisance. The facts of the case of King *vs.* Webb were that a subscription had been made in the city of Birmingham towards £20,000 in 20,000 shares, to buy corn, and to grind it into flour and to make it into bread and to deal in it and to distribute it. It appeared that this was done with laudable motives and for the purpose of more regularly supplying the town and the neighborhood with flour and bread, and that this was beneficial to the inhabitants at large. The court said that the acts shown to be done could not be regarded as a nuisance, and judgment was entered for the defendants.

The case of Pratt *vs.* Hutchinson,[1] sheds light on the same general subject. This was an indictment framed upon the same statute of 6 Geo. I, cap. 18. In this case, 50 persons agreed to raise 200 shares at £210 each by small monthly subscriptions for building houses for each other, with a stipulation for the members to employ *certain tradesmen only* in the building, with power to each member to sell his shares and transfer them in the books of the society, provided that the purchaser should be approved at a meeting of the society and should on his admission become a party to the original articles. The court held several propositions. One was that the stock was not in the true sense made transferable, as corporate stock, since the purchaser was to become a party to the original articles. Again, that the contract only to employ particular tradesmen in whom the parties had confidence was not in "restraint of trade" and that it was not illegal for persons to combine not to employ any other than certain specified persons. As Lord Ellenborough expressed it, "the combination must be for some *illegal object*," and there was nothing illegal in stipulating to employ particular per-

[1] 15 East, 511 (A.D. 1812).

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sons only in the building of the houses. Finally, it was urged by the prosecution that the clubbing together of numbers of persons with transferable shares, even though transferable only in a limited way, for the purpose of carrying on trade, was calculated to put down individual industry and competition, "which is most advantageous to the public." It was said: "If fifty persons may do this, why may not a thousand?" To this a distinguished member of the court, Bayley J., replied: "That would bring it to a question of fact, for the consideration of the jury, whether the extent of the numbers engaged in such undertakings was not prejudicial in fact to the public." [1]

The case of Pratt *vs.* Hutchinson must certainly be deemed an important authority to the effect that an act which is in itself laudable is not to be regarded as a nuisance simply because it may be stamped as a nuisance by legislative fiat, and that a mere combination of persons to accomplish a lawful end by lawful means is not in a legal sense a conspiracy, as some would strive to make us believe. It serves to meet an objection raised to "trusts," *viz.*: that they are an illegal assumption of corporate power. The certificates issued by trustees of "trusts" to the stockholders of companies surrendering corporate shares closely resemble those discussed in the case of Pratt *vs.* Hutchinson.

The statute just referred to was merely an outcome of an unnecessary fear and has long since been repealed.[2] Its only value now lies in the decisions to which it gave rise. After its repeal the question arose whether such companies as those described in the act are illegal at common law. The main inquiry has been as to the illegality of an organization in the nature of a partnership, without legislative sanction, having transferable stock or shares. Some of the very early cases declared such organizations to be illegal. Lord Eldon led the way in this view, holding [3] that companies with large capitals arising from numerous small contributions and with transferable

[1] 15 East, pp. 516, 517.
[2] See 6 Geo. IV, cap. 91.
[3] Kidder *vs.* Taylor, referred to in Lindley on Partnership, 1st ed. 150.

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shares were injurious to the public, and illegal independent of the "Bubble act."[1] Other cases containing similar expressions are cited below.[2] All of these contain special facts constituting or supposed to constitute illegality, so that the question was not fairly reached. In the time of Lord Brougham and later, the question was squarely presented; and henceforward the decisions, though presenting varying phases, are uniform to the effect that a joint-stock company with transferable shares, though unincorporated, is not illegal at common law, unless it can be shown affirmatively to be of a dangerous and mischievous character, tending to the grievance of the people.[3] Mr. Lindley (now Lord Justice of Appeal) in his excellent work on partnership, sums up the whole subject in six propositions, the substance of which is: that it is not illegal for any number of persons to enter into a contract of partnership; nor for them to agree that, when one retires, a person who is not a member of the firm but who is willing to become one shall take his place; nor that the new comer may be selected by the one retiring; nor that the outgoing and incoming partner may agree upon the terms of withdrawal and entrance, if these terms are not in themselves illegal; nor is it illegal for the members of the firm to assume a name, and to agree that the management of its affairs, both internal and external, shall be entrusted to a select few and that those few shall have power to make rules which others shall be bound to obey.[4] It seems extraordinary to business men of our day, to whose minds unincorporated joint-stock companies having transferable shares are almost as familiar a thought as incorporated companies, that within the memory of many men now living these organizations, though free from

[1] 6 Geo. I, cap. 18, secs. 18 and 19, already cited.

[2] Duvergier *vs.* Fellows, 5 Bing. 248; S. C. 10 B. & C. 826; and 1 Cl. and Fin. 39. Blundell *vs.* Winsor, 8 Sim. 60. Duvergier *vs.* Fellows, in the appellate court, was placed on the ground that the association was organized to accomplish *an illegal purpose.*

[3] The decisions serving to establish this point are: Walbam *vs.* Ingilby, 1 M. and K. 61; Garrard *vs.* Hardy, 5 Man. and Gr. 471; Harrison *vs.* Heathorn, 6 *Id.* 81. The rule has been extended to unincorporated companies with shares transferable by delivery. *Ex parte* Barclay, 26 Beav. 177; *Ex parte* Aston, 5 Jurist, N. S. 615.

[4] Lindley on Partnership (1st ed.) p. 153.

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all fault and doing a legitimate business, were considered by the highest legal minds to be illegal as a usurpation of corporate powers. The great Lord Eldon is to some extent responsible for the hold obtained by these highly erroneous ideas concerning trade. A prominent legal writer declares that Eldon's horror of forestalling and regrating was derived from what he had heard his grandmother at Newcastle and afterward his tutor at Oxford say, to the effect that thereby "the price of provisions is cruelly enhanced to the poor." When Lord Chancellor, he had to dispose of a bill in equity in which it was alleged by the plaintiffs that they were wholesale grocers; that, according to the usual course of the fruit trade, that article was imported in whole cargoes to a much greater extent than was sufficient for the supply of most of the persons employed in the wholesale trade; and that, in consequence of risk from the perishable nature of the commodity and the heavy duties with the prime cost, a society had been formed many years before and still subsisted by the title of "The Fruit Club," under the management of a select committee of which the defendants were members. The club was instituted for the purpose of making purchases of imported fruits and supplying the general trade, after deducting a reasonable profit to the committee for their trouble. The bill went on to allege that the committee had formed a scheme of getting into their own hands the exclusive possession of the trade and compelling all the wholesale dealers to apply to them for a supply, and recited various acts that they had done, *e.g.:* that they had bought at low prices and resold at high prices, had refused to have further dealings with buyers who had bought of others without first applying to them, and had in these ways obtained control of the market. This had led the plaintiffs to make a purchase of the committee, acting as trustees of the club. The object of the bill was to obtain a discovery, injunction, *etc.* Curiously enough, the committee claimed on behalf of the club that it was illegal and that, according to a familiar rule of law, no bill in equity could be sustained owing to the illegal nature of the transaction. Lord Eldon was very emphatic in denouncing the organization, say-

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ing that while these acts did not fall within the legal definition of the term forestalling, much less regrating, still less monopolizing, they contained the mischief of all three; for first, there was a conspiracy against the vendors, and next, *a conspiracy against the world at large* (!) enabling the committee to buy at any price they might think proper. He accordingly declared the transaction illegal.[1]

If all this tirade were good law, it might go hard with modern trusts. But the argument that the members of this "Fruit Club" had entered into a "conspiracy against the world at large" is too ridiculous to deserve refutation. Such a conspiracy would closely resemble Mrs. Partington's single-handed contest with the Atlantic ocean. Such childish remarks make the decision of Cousins *vs.* Smith of no value, except as showing the crude notions of trade entertained by some eminent judges as late as 1807. Lord Campbell, in his life of Lord Eldon, remarks that this decision was not satisfactory to Westminster Hall, and that if the question came up again, it might be overturned.[2] We will venture to prefer the later utterances of the judicial committee of the Privy Council, a high court of last resort, to the effect that "charges of engrossing or regrating" *etc.* would not meet with much countenance in these times when the true principles of trade and commerce are better and more generally understood.[3] But the case of Cousins *vs.* Smith is interesting as containing within it the germ of the modern "trust," and as showing the rude treatment which that invention received in its infancy.

Lord Kenyon, a great oracle of the common law as distinguished from equity, appears to have been as far from sound views of political economy as his more distinguished compeer on the Equity Bench (Lord Eldon). His ignorance of the principles of that science was fully displayed in Rex *vs.* Rusby.[4] Rusby was indicted for "regrating" thirty quarters of oats on

[1] Cousins *vs.* Smith, 13 Vesey, 542.
[2] Campbell's Lives of the Lord Chancellors, IX, 420 (Am. ed. 1875).
[3] Pettamberdass *vs.* Thackoorseydass, 7 Moore P. C. Cases, 239 (A.D. 1850).
[4] Peake's Nisi Prius Cases, 189 (A.D. 1800).

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November 8, 1799, having bought ninety quarters on that day. The "crime" which he committed was purchasing the oats at 41 shillings per quarter, and selling on the same day thirty quarters at 43 shillings. Lord Kenyon charged the jury in the following words:

> This cause presents itself to your notice on behalf of all ranks, rich and poor, but more especially the latter. Though in a state of society some must have greater comforts and luxuries than others, yet all should have the necessaries of life; and if the poor cannot exist, in vain may the rich look for happiness and prosperity. The legislature is never so well employed as when they look to the interests of those who are at a distance from them in the ranks of society. It is their duty to do so; religion calls for it; humanity calls for it; and if there are hearts who are not awake to either of those feelings, then our interests would dictate it. The law has not been disputed; for though in an evil hour all the statutes which had been existing above a century were at one blow repealed, —

and here he dealt a vicious blow at 12 Geo. III, cap. 71, repealing some restraints on trade, —

> yet, thank God, the provisions of the common law were not destroyed. The common law, though not to be found in the written records of the realm, has long been well known. It is co-eval with civilized society itself, and was formed from time to time by the wisdom of man. Good sense did not come in with the Conquest or at any other one time, but grew and increased from time to time with the wisdom of mankind. Even amongst the laws of the Saxons are to be found many wise provisions against forestalling and offences of this kind, and those laws laid the foundation of our common law. That it remains an offence, nobody has controverted. . . . Speculation has said that the fear of such an offence is ridiculous, and a very learned man, a good writer, has said you might as well fear witchcraft. *I wish Dr. Adam Smith had lived to hear the evidence of to-day*, and then he would have seen whether such an offence exists and whether it is to be dreaded. If he had been told that cattle and corn were brought to market, and then bought by a man whose purse happened to be longer than his neighbor's, so that the poor man who walks the streets and earns his daily bread by his daily labor could get none but through his hands and at the price he chose to demand; that it had been raised threepence, sixpence, ninepence and more per quarter on the same day; would he have said there was no danger from such an offence?

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Then he had his fling at Adam Smith and in the same breath complimented the jury:

> We are not monks and recluses, but come from a class in society that, I hope and believe, gives us opportunities of seeing as much of the world, and that has as much virtue amongst its members as any other, however elevated.

He then closed by quoting a public rumor:

> It has been said that in one county, I will not name it, a rich man has placed his emissaries to buy up all the butter coming to the market; if such a fact does exist, and the poor of that neighborhood cannot get the necessaries of life, the event of your verdict may be highly useful to the public.[1]

When one reads this shocking tirade, one can well believe the reporter that the jury found the defendant guilty. The wealthy offender who so deeply excited the wrath of the Lord Chief Justice had only sold 250 bushels of oats at a profit of six cents a bushel. How would one of our produce exchanges relish the information that regrating (buying to sell again) is a common-law crime, and what would its members think of the magnitude of the transaction which elicited such a startling judicial charge?

Rusby, though convicted and heavily sentenced, did not actually suffer, since the appellate court was equally divided in opinion as to whether regrating was a common-law offence. Judicial opinion could not, however, long stem the tide which was setting irresistibly in opposition to legal restraints upon trade. Sidney Smith says that ten judges out of twelve at this time laid down similar doctrines in their charges to the various grand juries on their circuits. Rusby was convicted in 1799. Sound principles triumphed in 1844, when Parliament repealed all laws against "badgering, engrossing, forestalling and regrating," including any rules of the common law. The phraseology of the first section at its close is very emphatic. It declares that

> after the passing of this act the several offences of badgering, engrossing, forestalling and regrating shall be utterly taken away and abolished, and that no proceeding shall lie either at common law or by virtue of any statute, for or by reason of the said offences or supposed offences.

[1] Rex *vs.* Rusby, Peake's Nisi Prius Cases, pp. 190–194.

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It is instructive to know that this statute of 1844 (7 and 8 Vict. cap. 24) abolished by name either the whole or parts of eighteen English restrictive statutes extending from the time of Henry III to that of Edward VI, ten Scotch statutes enacted by the Scotch Parliament from 1503 to 1661, and eight acts or parts of acts passed by the Parliaments of Ireland from the time of Edward IV to that of George III. Of all these acts, and of the decisions under them, nothing remains except by way of warning that the laws of trade and commerce cannot be effectually subverted. They testify to the ignorance of Parliaments, the puerility of judges, the subservience of juries, and the sufferings of their victims, but to little more. Even the very words employed have passed out of the memory of men, for few can state the distinction between a "badger" and a "regrator," *etc.*

There is an important exception in the statute of 7 and 8 Vict. cap. 24, to which reference should be made. It is to the effect that the repealing clauses shall not apply to the offence of knowingly or fraudulently spreading or conspiring to spread false rumors with intent to enhance or decry the price of any goods or merchandise, nor to the offence of preventing or endeavoring to prevent by force or threats any goods, wares, or merchandise being brought to any fair or market, but that every such offence may be inquired of, tried and punished as if the repealing act did not exist. These acts of fraud and force are all that now remain in England of the common law of forestalling and engrossing or kindred offences, and of the statutes that have been enacted from time to time during the entire history of the nation in any and all of its Parliaments.

It remains to notice a topic in the common law of contracts concerning "restraint of trade." The meaning of this expression is, that a contract may be declared to be illegal and void because by means of the contract one of the parties has either wholly or partially restrained himself from following a trade or business. An element of public policy is assumed to be involved in the case. The parties cannot be in law judges of

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their own best interests. It is perfectly lawful for a person to abandon a trade or profession and to remain idle, but he cannot legally agree with another to do so except within certain legally specified limits. A distinction is accordingly drawn between a contract in general and one in partial restraint of trade. The latter, under proper circumstances, may be upheld by the courts. Where these distinctions are recognized, the question of legality arises solely *between the parties to the contract:* on the application of one of them the court declares the contract invalid. There is a marked tendency in judicial decision to restrict the application of this doctrine and substantially to declare it untenable, though the whole theory has not yet been discarded.[1] This is shown in a remarkable degree by the very recent decision in the case of Diamond Match Co. *vs.* Roeber[2] in the New York Court of Appeals, in which the court established the rule that a contract in restraint of trade within any or all of the states or territories except Nevada and Montana was valid, and held that the question as to what is a general restraint of trade does not depend on state lines; they are not the boundaries of trade and commerce, and a restraint is not necessarily general which embraces an entire state. It was further decided that the *motive* for the restraining agreement is not a test of its validity, since one may legally enter into such a contract for the very purpose of preventing competition. As the law now stands, in England and New York, the restraining agreement is valid if it furnishes a fair protection to one of the parties and is reasonable. The phrase "partial restraint of trade" has grown more and more elastic, for it is difficult to imagine any restraint much more general than that embracing all of the states and territories except Nevada and Montana, these not being commercial states. It is quite plain from the opinions of the judges in these recent cases that the old rule concerning contracts in restraint of trade is deemed to be antiquated and out of touch with the most enlightened views of trade and commerce.

[1] Rousillon *vs.* Rousillon, L. R. 14 Ch. Division, 351; Printing Company *vs.* Sampson, L. R. 19 Eq. Cases, 462. [2] 106 N. Y. 473.

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The decision in Diamond Match Co. *vs.* Roeber seems to have a considerable bearing upon a clause quite likely to be inserted in a "trust" agreement between several producing establishments, to the effect that the trustees may control the production of one or more of them, even so far as to direct that they temporarily refrain from further production. Such a clause would seem to be in its essential elements a restraint upon trade. It is true that the court says, in the course of its reasoning in that case, "that combinations between producers to limit production and to enhance prices are or may be unlawful, but they stand on a different footing." This statement was no doubt intended to cover the case where there was an intent to enhance prices, and cannot be reasonably applied to combinations where the purpose is innocent, for example, to keep the supply steady and adequate to the public wants, and to avoid overproduction. In such cases the principle enunciated in Diamond Match Co. *vs.* Roeber would seem to be applicable: the restraint would be partial because limited in point of time. But the decisive point is that (as will be shown hereafter) persons constituting a "trust" become partners. They do not stand at arm's length, but hold mutual relations of confidence. In such a case, the rules governing contracts in restraint of trade are not applicable. As Lord Abinger says, in Wallis *vs.* Day:[1] "In partnership agreements, nothing is more common than to stipulate that neither party shall carry on trade except as a partner." Their relations as between themselves should be governed by the rule announced in 106 N. Y. 442, which is that courts should favor the utmost freedom of contract within the law, and require that business transactions should not be trammelled by unnecessary restrictions.

The case of Wickens *vs.* Evans[2] bears strongly upon the right of various producers to enter into reciprocal agreements to prevent competition. In that case it appeared that there were three men who separately followed the business of manufacturing trunks and boxes and who sold them by the aid of

[1] 2 Meeson & Welsby, 279.
[2] 3 Younge & Jervis (Eng. Exchequer R.) 318.

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commercial travellers in various parts of England. Finding that they were subjected to losses from unrestricted competition among themselves, they entered into an agreement for dividing the territory over which they had travelled into separate and distinct districts, which should be allotted separately to each without interference by the others. The districts were marked on a map, and the allotment was to continue during their joint lives. There were clauses that neither of them would allow any goods to be manufactured at his works to be sent, or allow them in any way to be sent from his shops into the territory allotted to any other, and that neither of them would buy certain chests at a higher price than a sum named in the agreement, the intention being that each should have his territory to vend his goods in free from all hindrance, direct or indirect, from the other. It was argued against the validity of this agreement that it created a monopoly ; to which the conclusive answer was that every other box-maker was at liberty to carry on business in any of the districts to which the contract was referrible, and this view the court acceded to,[1] and the contract was upheld.

On similar grounds, an agreement to equalize the business between various producers at a particular port has been maintained. Such a principle was applied to a case where four master stevedores divided up by agreement the business of specified merchants among themselves, with a provision that if the merchant set down to one did not choose to employ him but did employ one of the other four, that one should perform the service required and at the same time render to the one passed over an equivalent.[2]

The following conclusions may now be stated as a basis for the further consideration of "trusts" as applicable to agreements between shareholders of corporations :

(1) It is quite doubtful whether, at the common law, the acts characterized as forestalling, regrating or engrossing were criminal offences, unless they concerned the necessaries of life.

[1] *Ibid.* pp. 329, 330.
[2] Collins *vs.* Locke, L. R. 4 App. Cases, 674.

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The sounder opinion seems to be that these offences, with the exception named, were statutory crimes, made so in the reign of King Edward the Sixth.

(2) If forestalling was criminal at common law, it was only so where there was alleged and proved to be a criminal intent to injure trade, as by spreading false rumors or by combinations to enhance prices and the like. The intent, however, may be inferred from acts clearly pointing to it. But where the purpose of those charged with alleged criminal acts of this kind is laudable, as for example to regulate prices and keep them steady, no criminal intent can be inferred, and no crime is committed.

(3) The statute of 5 and 6 Edward VI was based upon false views of political economy and unnecessarily interfered with trade. It had no permanent influence upon the law, and since its repeal the common law against forestalling, *etc.*, so far as it existed, has fallen practically into disuse, sounder views of political economy having come to prevail in the courts.

This branch of the law, so far as it existed in England, was abolished by the statute 7 and 8 Vict. cap. 24.

(4) It is not a nuisance at common law for persons, no matter how many, to agree to form an unincorporated association and to issue certificates of shares representing property contributed, nor to make the certificates transferable either by written assignment or by delivery, nor to establish a committee having power to make rules for the government of the association. Persons doing these acts do not usurp the functions of a corporation, for the great and distinguishing feature of a corporation is the possession of such juristic qualities as to be a new legal person, distinct from the individuals forming it. To usurp the functions of a corporation, there must be the usurpation of the qualities of a "person," as for example to sue or to be sued in an assumed corporate name.

(5) The old rules of the common law declaring a contract made in general restraint of trade to be void as between the parties were based on erroneous views of political economy, have practically disappeared in great trade centres, *e.g.* in Eng-

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land and New York, and are likely to be much modified elsewhere. The prevailing view in leading courts as well as in scientific circles is that the utmost freedom should be left to producers and traders in making contracts of a reasonable nature (as between the parties) concerning trade and commerce, even where the object of the contract in question is to prevent competition between the parties to it.

We now proceed to consider the application of these principles to "trusts" as we find them existing in this country.

For the purpose of a clear understanding of the subject, a well-known "trust" deed is subjoined,[1] which may be taken as a representative instrument. It is that of the Sugar Refineries company, which has been under investigation by a committee

[1] DEED.

THE SUGAR REFINERIES COMPANY.

The undersigned, namely:

Havemeyers & Elder, The DeCastro and Donner Sugar Refining Company, F. O. Matthiessen & Weichers' Sugar Refining Company, Havemeyer Sugar Refining Company, Brooklyn Sugar Refining Company, the firm of Dick & Meyer, the firm of Moller, Sierck & Company, North River Sugar Refining Company, the firm of Oxnard Brothers, the Standard Sugar Refinery, the Bay State Sugar Refinery, the Boston Sugar Refining Company, the Continental Sugar Refinery and the Revere Sugar Refinery, for the purpose of forming the board hereinafter provided for and for other purposes hereinafter set forth, enter into the following agreement:

NAME.

The board herein provided for shall be designated by the name of The Sugar Refineries Company.

OBJECTS.

The objects of this agreement are:

1. To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with a reasonable profit.

2. To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar.

3. To furnish protection against unlawful combinations of labor.

4. To protect against inducements to lower the standard of refined sugars.

5. Generally to promote the interests of the parties hereto in all lawful and suitable ways.

BOARD.

The parties hereto who are not corporations shall become such before this deed takes effect.

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of the New York Senate. The deed is taken from the printed report of the committee.

The principal points in this deed are: (1) the objects; (2) the agreement that corporate shares shall be surrendered to a board of eleven persons having specified powers; (3) the plan that the several corporations shall maintain their separate organiza-

Each corporation subscribing hereto agrees and the parties hereto who are not corporations agree as to the corporations which they are to form, that all the shares of the capital stock of all such corporations shall be transferred to a board consisting of eleven persons, which may be increased to thirteen by vote of the majority of the members of the entire board, the two additional members to belong respectively to the first and second classes hereinafter provided for.

Any member of the board may be removed by vote of two-thirds of the members of the entire board, in case of incapacity or neglect, or refusal to serve.

Any member may resign by filing written notice of his resignation with the secretary of said board.

Vacancies during the term of office of members shall be filled by appointment, by vote of the majority of the members of the entire board.

A member appointed to fill a vacancy shall hold office until the expiration of the term of the member in whose place he is appointed, which new appointee shall succeed to all the rights, duties and obligations of his predecessor under this deed.

Vacancies by expiration of office shall be filled at the annual meeting of the holders of certificates herein provided for, or at such other times as shall be prescribed by the board.

Such annual meetings shall be held in the city of New York in the month of June, and notice shall be given to each certificate holder of record, of every meeting of certificate holders, by mailing to him at least seven days before said meeting, a notice of the time, place and objects of such meeting. Holders of certificates shall vote according to the number of shares for which they hold certificates. They may vote by proxy.

The board may make by-laws. All arrangements for meetings, elections, and all details not herein specifically provided for, shall be made by the board. A member of the board may act by proxy for any other member with like effect as if he were present and acting.

A majority of the members of the board shall constitute a quorum for the transaction of business. The action of a board meeting, by a majority vote of such meeting, shall have the same effect as the unanimous action of the board, except as herein otherwise provided, and that to authorize the appropriation of money, bonds or shares, shall require the assent either written or expressed by vote, at a board meeting, of at least a majority of the members of the entire board.

No member of the board shall, during the time that he holds office, buy or sell sugar, or be interested directly or indirectly in the purchase or sale of sugar, whether for the purpose of speculation or otherwise, without a vote of a majority of the members of the entire board. For any violation of this provision, he may be removed as a member of the board and shall be liable to account for profits which shall be realized by him to the board for the *pro rata* benefit of the certificate holders.

As it is desirable that the board shall consist of members who are largely inter-

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tions and each carry on and conduct its own business; (4) that the stockholders surrendering their stock shall receive certificates signed by the board, instead of retaining certificates of stock in their respective corporations. Uniformity of board certificates takes the place of diversity of stock certificates. As a matter of form the "board certificates" are issued to each

ested in the properties and the business contemplated, it is hereby agreed that all members of the board shall be free to join in or become parties to agreements and transactions which the several boards of directors, hereinafter referred to, or this board, may arrange, to the same extent and in the same manner, and with the like effect, as if they were not members of the board.

The said board may transfer, from time to time, to such persons as it may be desired to constitute trustees or directors or other officers or corporations, so many of the shares as may be necessary for that purpose, to be held by them subject to the provisions of this instrument. Such transfers may be executed by the president and treasurer of the board, in behalf of and as attorneys of the board, for that purpose and to be re-transferred when so requested by the board.

The first board shall consist of the persons hereinafter mentioned. They shall hold office as follows, and until their successors shall be elected:

Members of the First Class.

Harry O. Havemeyer, F. O. Matthiessen, John E. Searles, Jr., Julius A. Stursberg, to hold office seven years.

Members of the Second Class.

Theodore A. Havemeyer, Joseph B. Thomas, John Jurgensen; Hector C. Havemeyer withdrew and Mr. Parsons substituted, to hold office five years.

Members of the Third Class.

Charles H. Senff, William Dick, to hold office three years.

At the expiration of the terms of the third class, and of each successive class, their successors, as members of such class, shall be elected for seven years.

OFFICERS.

The board shall appoint from its members a president, vice-president and treasurer, and it shall also appoint a secretary, who may or may not be a member of the board. The board may, from time to time, create other offices and appoint the persons to fill them. It may appoint committees. It shall designate the duties and prescribe the powers of the several officers and committees.

PLAN.

The several corporations, parties to this agreement, shall maintain their separate organization, and each shall carry on and conduct its own business.

The capital stock of each corporation shall be transferred to the board, and in lieu of the same, certificates not exceeding fifty millions of dollars, divided into five hundred thousand shares, each of one hundred dollars, shall be issued by the board and distributed as hereinafter provided.

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corporation in a fixed proportion. It is made the duty of the corporation receiving the certificates to distribute them among the stockholders making surrenders in the proportion that each one's stock bears to the capital of the company. (5) The profits of each company are to be made over by it in the form of dividends to the board, who are to distribute them proportionately

The certificate shall be in the following form:

No..... Shares.

Shares One Hundred Dollars Each.

THE SUGAR REFINERIES COMPANY.

This is to certify that..... .....is entitled to..... shares of the Sugar Refineries Company.

This certificate is issued under and subject to the provisions of a deed dated the sixteenth day of August, one thousand eight hundred and eighty-seven.

The shares represented by this certificate are transferable by the holder and his personal representatives in person or by attorney, upon the books of the board, and not otherwise, and only upon the surrender of this certificate.

They entitle the holder to the rights and are subject to the provisions mentioned in the deed.

The interest of the holder is in the proportion of the number of shares represented by this certificate to the entire number of shares outstanding. The total amount represented by outstanding certificates, and the terms of the deed may be changed from time to time by a majority in interest as therein provided.

[L. S.] In witness whereof the board has caused this certificate to be signed by its president and treasurer, and the seal of the board to be affixed hereto, the.....day of....., one thousand eight hundred and eighty.....

For value received,.....do hereby assign, transfer and set over unto..... shares of those represented by the within certificate, and....do hereby constitute and appoint.....attorney, irrevocable, for.....and in.....name and stead, to transfer the said shares upon the books kept for the purpose under the direction of the within board.

The assignee by accepting this transfer assents to the terms of the deed referred to in the certificate as the same shall be changed from time to time.

Witness.....hand and seal this.....day of....., one thousand eight hundred and eighty.....

TITLE.

The shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the members of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants.

By the death, resignation or removal of any member of the board the whole title shall remain in the others. All members ceasing to be such shall execute such instruments as may be necessary, if any, to keep the title vested in the persons who from time to time shall be members of the board.

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among the holders of the board certificates. In this way, the stockholders of a company making no profit will receive a share of the profits of other companies, should any be made. (6) As a result of the whole proceeding, if fully carried out, the board becomes the holder of all the stock certificates of the companies embraced within the agreement, at the same time being

The board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations and subject only to the purposes set forth in this deed.

DIVISION OF INTEREST.

The several corporations shall be entitled to the shares in the following proportions of the fifty millions of dollars, *viz.*:

[Here follow the names of the several corporations.]

Each refinery and the corporation to which it belongs shall be freed from liability and indebtedness by the parties interested in it; or such parties, if the board shall approve, may provide in cash for such indebtedness or liability, leaving the same to stand at the pleasure of the board; except that the employés' contracts shown in the schedules hereto annexed, and the contracts with Havemeyer and Elder, the F. O. Matthiesen and Weichers Sugar Refining Company and the Bay State Sugar Refinery pending for improvements and enlargements, shall continue as liabilities.

Annexed hereto are schedules in general terms of the properties of the several refineries. The properties are guaranteed to correspond with the schedules by the parties interested therein, who are to make good any deficiency. On the complete execution of this agreement each of the parties shall make a full inventory of the property not embraced in such schedules and useful for the conduct of the business, on hand or contracted for, including raw and refined sugars, molasses, sugars in process, syrups, bone black, fuel barrels, packages, charcoal and other supplies, and such inventory is to be examined and the articles appraised at their present cash value (except as to sugar and molasses to arrive, which are to be appraised at their market value on arrival) by a committee of five persons as follows: Theodore A. Havemeyer, F. O. Matthiessen, Julius A. Stursberg, John E. Searles, Jr., and Joseph B. Thomas.

The value of such property as fixed by four-fifths of the appraisers shall be paid for in cash by the said board to the treasurer of each corporation.

Bone black may at the option of the board be paid for in cash or in the bonds hereinafter provided for, or in certificates at a rate for bonds or certificates to be fixed by a vote of a majority of the members of the entire board.

The property shall remain with the refinery where it is, to be used by it, except as such refinery shall make a different disposition of it.

In consideration of the transfers of their stock to the board, the said board shall also pay to Havemeyers & Elder the sum of ....., to the F. O. Matthiessen & Weichers Sugar Refining Company the sum of ....., and to the Bay State Refining Company the sum of ....., on account of payments already made on pending contracts for improvements and enlargements.

Additional shares to the amount of $400,000, less fifteen per cent, to be left with the board as hereinafter provided, shall be received by Moller, Sierck & Co., for im-

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charged with a *trust* in favor of the former stockholder or his assignee as set forth in the certificate which refers to the provisions of the trust deed.

It will be assumed without discussion that the objects to be accomplished by the arrangement are truly set forth in the deed and that they are in all respects lawful objects to be pursued,

provements and enlargements of capacity of their refinery now in progress, when said improvements are completed, and the increased capacity demonstrated.

The shares assigned to the several refineries shall be distributed by them to and among the parties interested therein.

Each holder of stock in a refinery company shall be entitled to so many of the shares allotted to such refinery as shall be in proportion of his stock to the capital of his company.

Shares for stockholders of any refinery company who shall not surrender their stock, may, under the direction of the board, be deposited for their account with the right to receive the same upon the surrender of their stock.

Of the shares allotted to the several refineries they shall leave fifteen per cent with the board, and those shares and any shares not allotted of the fifty millions of dollars, except as herein otherwise provided, shall be subject to be disposed of by the board, either for the acquisition of other refineries to become parties to this deed, payment for additional capacity, or by appropriations to the several refineries.

But in no case shall any appropriation be made to or any action be taken by any corporation without the approval of its board of directors, and no action shall be taken by the board which shall create liability by it or by its members.

PROFITS.

The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock as hereinbefore provided.

FISCAL ARRANGEMENTS.

The funds necessary to enable the said board to make the payments herein provided to be made by it, may be raised by mortgage to be made by the corporations or either, any or all of them on their property, and by such other means as shall be satisfactory to such board.

In case any mortgage shall be laid on the property of any corporation by its directors or stockholders the holders of certificates shall, within a time to be fixed by said board, have the right at such uniform rates as said board shall arrange, to have the bonds, certificates or other evidence of debts or interest in proportion to their respective holdings. Any parts which shall not be thus taken may be disposed of by said board.

CHANGES.

The number of shares and the total amount thereof, issuable by said board, may, from time to time, be increased or diminished by deed executed by a majority in value of the certificate holders.

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and that the only inquiry is whether proper and lawful means have been resorted to by the various parties who have signed the deed. A variety of legal questions may arise under such an instrument. In this paper, no attempt will be made to discuss any but those which grow out of the trust between the stockholders of the corporations and the board or committee, with a view to ascertaining whether they are in accordance with law. The terms of the agreement are complicated. They might be made much more simple and the general purpose of the stockholders still be attained.

Before entering upon the discussion of our topic as thus limited, it may be well to say that there is not in the law of New York any legislation concerning trusts in general which prevents trusts of this kind. The law of that state defining the number of express trusts is solely applicable to real estate.

The provisions of this deed may from time to time be changed by deed executed by not less than a majority in interest of the certificate holders, provided no change shall be made which shall discriminate to the disadvantage of the certificate holders as between themselves.

ACQUISITION OF OTHER REFINERIES.

The capital stock of other sugar refining companies and of companies whose business relates directly or indirectly to sugar refining (in every instance to be incorporated) may be transferred to said board with the consent of a majority thereof at valuations and upon terms satisfactory to it to be held by said board under and subject to all the terms of this deed, and certificates may be issued therefor by said board and may be sold by it to provide funds for such purchase or purchases, and any such corporation or corporations shall thereupon become a party to this deed upon causing the same to be duly signed in its behalf.

CUSTODY OF DEED.

This deed, when executed by the parties hereto, shall be delivered to the president of the board, who shall have the sole and independent custody and control of the same, and the said deed shall not be shown or delivered to any person or persons whatsoever except by the express direction and order of the board.

A copy of the said deed shall be lodged with a member of the board residing in Boston, Massachusetts, which shall be held by him under the same conditions and in the same manner as the original deed.

In witness whereof the parties have hereto set their seals and affixed their names, these presents to become binding when completely executed by all the parties, and to take effect from October 1st, 1887.

Dated August 16th, 1887. [Here follow signatures.]

Report of the Committee . . . . . on the Investigation relative to Trusts. Transmitted to the Legislature, March 6, 1888. [Senate, No. 50.] Pages 644–651.

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Trusts of corporate stock concern personal property and are beyond the purview of that legislation. This is probably true of a number of the other statutes referred to in the *Harvard Law Review*.[1]

One general fact, running through the trusts against which an outcry has recently been made, is that the producers of certain commodities are corporations, having power by law to have a subscribed capital in shares and to issue transferable certificates of stock to the subscribers. This course having been taken by the corporations respectively, the *subscribers* or stockholders of a number of such corporations enter into an agreement between themselves whereby, among other things, they transfer to a committee their certificates of corporate shares. This committee take out from each corporation new certificates of shares in their own names, and thereupon issue in return to the old stockholders certificates *of their own* and not of the corporation. The result of this is that the committee become the stockholders on the corporate books and have the same power of control as the stockholders would have had if they had retained their position as stockholders. This course of action, if it had been taken to effectuate a transfer of ownership as the result of a sale, would have been one of the ordinary transactions connected with the transfer of stock, except that no certificate would have been issued by the new to the former owner. The reason for the difference is that in the so-called "trust" the stockholder does not intend, in making the transfer to the committee, to part with his ownership, but rather to confer a power of control for the stockholder's ultimate benefit. It would be impossible to persuade any stockholder in his right mind to take such a course unless he supposed that it would be likely to be beneficial to himself. And if the main body of stockholders concur it must be assumed to be in their view for the general benefit. Nothing is more certain than the proposition that every stockholder has a right in law to put his stock in this way in the name of a trustee, provided that the *purpose* be lawful. There is nothing in law to prevent each stockholder

[1] Vol. I, p. 136.

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from selecting the same trustee or trustees, and designating the same purpose. There is nothing in the existing law of personal property requiring the purpose (which is technically called a "declaration of trust") to be in writing, though there is such a rule as to trusts in real estate. Still, it may as to personal property be put in writing, and prudence would require that it should be. Accordingly, it is reasonable to suppose that, in such great transactions as are now under consideration, the stockholders will not surrender their certificates to the committee without a written agreement defining the powers of such committee and the purposes for which the transfer is made. Such an agreement "declares" the trust. It thus appears that a trust is in itself a colorless thing. It is a legal contrivance in daily use. It has in itself no element of good or bad. It is the purpose, if anything, which gives it the stamp of illegality.

We are thus led to the conclusion that we have before us the very problem that we would have if individuals, not stockholders or members of incorporated companies, were doing the acts in question, and all the questions that have already been discussed become pertinent to the present inquiry. It may, however, properly be pointed out, for the sake of insuring still greater clearness, that the corporations in which the shareholders have stock are not parties in any form whatever to the trust as between the stockholders and the committee. The stockholders cannot in law be confounded with the corporations. The latter still remain in existence. The agreements between the stockholders may be modified or abrogated. The corporations in each case are untouched. They may carry on their business as before, earn profits, or remain idle and earn none. Whatever moral force the agreement of the stockholders may have upon the corporation, it has no direct legal effect. If the corporate directors should refuse to pay attention to the wishes of the stockholders, nothing could be accomplished by the latter until, at the annual election, they proceeded to choose more complaisant directors.

It will be necessary, at this stage of the investigation, to consider more closely the exact interest which a stockholder in a corporation has in its property and business.

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Owing to the settled rule that a corporation is a distinct legal person, the stockholders do not own its property in a strict sense, but at most have a certain interest in it of an equitable nature. This interest is in the nature of a right of action in an appropriate court of justice, being termed a "thing in action." Accordingly, if the corporation owns land, the stockholders do not have any ownership of the real estate, but their right of action is deemed to be personal property, as it is in every other supposable instance. The ownership of stock confers upon the owner the following principal rights: (*a*) to vote for managers or directors at an election; (*b*) to receive dividends, if declared; and (*c*) to hold the corporation or directors to account for the management of its affairs in a court of justice. When the corporation is dissolved, the property remaining after payment of debts may vest in the stockholders; but while the corporation continues to exist, it in a proper sense belongs to the corporation, so that the interest of the stockholders is theoretically incorporeal, and their rights as between themselves and the corporation are worked out by a court of equity on the footing of a trust. The stock certificates issued to them are but the symbols of the rights which grow out of the relation existing between the corporation and its stockholders — rights which would arise even though no certificates were ever issued. Grouping together the various rights of stockholders as evidenced by the usual certificates, they may be termed "equitable" rights as distinguished from the rights of the corporation itself, which may be termed "legal" rights. The point of inquiry then is: Can a portion or all of the stockholders of a number of corporations unite and contribute their equitable rights as stockholders to the formation of an unincorporated association, with a view to bringing into a compound fund the profits which might accrue to them as dividends and sharing among themselves, according to some fixed rule, the profits as well as the losses of all the corporations, and so wield their voting power as to make their arrangement potential and permanent? Two questions spring out of this inquiry. One is, whether such an arrangement would be a

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partnership; and the other, whether such a partnership, if there be one, is lawful.

Let us take, for example, the sugar trust. There is not the least reason for holding the sugar trust to be a corporation. It is simply a voluntary unincorporated association, in which the stockholders of various corporations engaged in the manufacture of sugar contribute their stock shares and agree to share the profits of the manufacturers on all the shares when placed in a common fund, agreeing indirectly also to share the losses naturally falling upon stockholders in other companies in which no profits are made. The fact must be kept steadily in view that the profits go into a common fund, and the common fund is divided up among the stockholders of various companies signing the sugar trust agreement. It will be contended in the present discussion that this constitutes an association in the nature of a partnership. The grand element in a partnership is that something shall be attempted with a view to gain and that the gain shall be shared by the parties to the agreement. Another common form of statement is that there must be an agreement to share "profits." This word does not mean gross returns but net profits; and this element appears to be present in a trust agreement, for the various shares are brought together as property with a view that there shall be such a management as to make profit and that the profit shall be divided among all the contracting parties. Perhaps the subject will be made more clear by a concrete illustration. Let us suppose that there are four or five private individuals separately manufacturing a commodity within a limited district, in competition so close as to forbid any profit. These manufacturers finally enter into an agreement that they will create a committee to decide which of the establishments shall cease running and of course make no profit, and that the net profits realized by the others shall be paid into a common fund held by the committee and divided among *all* the manufacturers. This arrangement would apparently be a partnership among all, as the act of one or more in consenting to be idle would be as necessary an element in obtaining a profit as the act of others in continuing to make profit.

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It may be well, at this point, to ascertain whether there is any "consideration" for such an agreement. It is a perfectly well understood rule of the common law that a promise without a consideration is nugatory and void. The consideration is, however, ample in the case supposed. It may consist in the mutual promises to form the partnership, each promise being the consideration for the other. Again, a consideration may be sought in the consent of the shareholders of a particular company that their establishment may be idle, it being a settled rule that a consideration may be derived not only from a benefit to be received under the agreement by the promisor, but also from a loss or inconvenience to be sustained by the promisee.

The fact that the stock, in the case of a "trust," does not stand in the name of the stockholders but in that of the trustees is not material in this part of the discussion. The original stockholders have given up their formal ownership to accomplish the purpose designed to be carried out in the trust agreement. Should that fail to be carried out, they have a right to their stock again. Their position during the existence of the trust resembles that of beneficiaries of the estate of a deceased person when the executors are carrying on partnership business with the funds of the estate by the direction of the testator.

Let us state this last matter more fully. Assume that A, B, C and D were separately and individually engaged in the manufacture of sugar in a circumscribed district. Each is dead, and has in his will directed his executors to carry on the business for the benefit of his heirs and next of kin, who are of full age. The proprietors of the various establishments find themselves suffering from ruinous competition. The beneficiaries in each estate sign an agreement authorizing co-operation between the various establishments in the general manner of a so-called trust. This case comes very close to the agreement between stockholders in a number of corporations, since the beneficiaries in each estate do not have the legal title to the capital employed, but only an equitable interest.

It is well settled that executors carrying on a business in this

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way may become liable as partners, even though they derive no pecuniary benefit from the transaction. It is enough that they receive the profits or a share of them, even if they do so not for their own benefit but solely for the purpose of making them over to the beneficiaries whom they represent. The assent of the beneficiaries may also bind them as equitable partners, though that would not relieve the executors as between themselves and third persons who have claims against them as partners.[1]

On similar principles, it would follow that the trustees in the trusts now under discussion, having the right to deal with the interests of stockholders in various corporations so as to obtain and share profits, would be to that extent, partners. This view is sustained by the case of Brett *vs.* Beckwith.[2] Two underwriters separately and distinctly insured risks on a marine insurance policy and agreed as between themselves to share the risks, paying or receiving sums according to the results of the accounts. This arrangement made them partners. It is not necessary that the agreement should contain the word partnership or its equivalent.[3]

The result therefore would seem to be that a "trust," no matter how large may be the interests that it controls, is but a partnership, and that its validity will depend, like that of ordinary partnerships, upon the purpose sought to be accomplished.

It will now be necessary to consider and reconcile some cases which may, at first blush, seem to be opposed to this view. It is stated in a note to the thirteenth edition of Kent's Commentaries that

> arrangements for pooling profits, that is, for putting the net profits of different concerns together at the end of a certain time and dividing them in a certain proportion irrespective of the amounts contributed, have been held not to create partnerships.

The reason for this rule is subjoined in the following terms:

[1] Wightman *vs.* Townroe, 1 M. and S. 412; *Ex parte* Garland, 10 Vesey, 119.

[2] 3 Jurist N. S. 31.

[3] Lindley on Partnership, p. 12; Greenham *vs.* Gray, 4 Irish Com. Law, 501; Marsh *vs.* Russell, 66 N. Y. 288.

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And this seems to be explained by the modern English doctrines on the ground that the several parties continue to carry on the business on their own behalf alone, although they have bound themselves to pay over a part of what they make.[1]

Assuming that the rule concerning "pooling profits" as thus stated is sound, it manifestly does not include "trusts," since the several parties do not, in the words of the annotator, afterwards "continue to carry on the business *in their own behalf alone.*" The agreement binds one or more of them not to carry on the business at all if the best interests of the associated parties taken as a whole seem to require that course, and yet they participate in the profits of those who do carry on business. There is thus, as far as the stockholders are concerned, a joint control exercised over each separate manufactory, and such a community of interest is inconsistent with completely separate management. A very well reasoned case in the New York reports, that of Champion *vs.* Bostwick,[2] shows the real principle and the rule to be derived from it. The opinion on the appeal discloses the ground of the decision. The facts were, in substance, that A, B and C ran a line of stage coaches from Utica to Rochester, New York, and the route was divided between them into sections, the occupant of each section furnishing his own carriages and horses and paying the expenses of his own section. The money received from passengers, after paying out of it the turnpike tolls over the whole route, was divided among the parties in proportion to the number of miles run by each. This arrangement was held to constitute a partnership. Stress was laid upon the fact that the passage money constituted a *common fund* out of which the tolls were first to be paid, and the residue was to be divided according to the number of miles run by each. This, of course, would not necessarily be the equivalent of the amount earned by any occupant upon his section. Some passengers might travel only on one section; another section might include the travel of a large city. Whatever any one

[1] Kent's Commentaries, 13th ed., vol. 3, p. 25, note 1.
[2] 11 Wendell, 57; S. C. on Appeal, 18 *Id.* 175 (A.D. 1837).

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received was a proportionate share of the profits considered as a whole. This case has never been judicially weakened, though it came up for explanation in 1859 in the case of Merrick *vs.* Gordon.[1] In this last case, the agreement between the alleged partners embraced only the division of the freight on goods transported over the lines of both of them to and from specified points; as if, for example, A's line extending from New York to Poughkeepsie and B's line from Poughkeepsie to Albany, the division of the freight over the whole line was made between A and B in fixed proportions. It was decided that this arrangement did not constitute a partnership, as no common fund was created. At the same time, the authority of Champion *vs.* Bostwick was fully recognized.[2] It may accordingly be said that wherever the profits are to become a common fund and various distinct producers have an interest in the fund before any division of profits, a partnership is created.[3]

Assuming that a partnership exists between the various producers in a "trust," their power to make an agreement to prevent competition between themselves cannot be denied unless it is in some way unlawful *in its own nature.* This has appeared in the course of this discussion, and the results reached may be briefly stated: (1) Such an agreement cannot be criminal at common law without a bad intent, such as to raise prices unduly. It is not wrong at common law to raise prices so as to pay the cost of production with a reasonable profit, nor under the same circumstances to regulate them and keep them steady. (2) Such an agreement cannot be treated as a criminal act under a statute declaring it to be criminal conspiracy for two or more persons to conspire to "commit an act injurious to trade or commerce,"[4]

[1] 20 N. Y. 93. [2] *Ibid.* p. 95.

[3] The case of Champion *vs.* Bostwick has been approved in the late cases of Burnett *vs.* Snyder, 81 N. Y. 555; Strober *vs.* Elting, 97 *Id.* 102; Ontario Bank *vs.* Hennessey, 48 *Id.* 55. Some cases which have been assumed at times to be in conflict with Champion *vs.* Bostwick are not really so, since there was no community of interest before the division of profits was made. They belong to the class of cases represented by Merrick *vs.* Gordon, commented upon in the text of this article. Among them are Wright *vs.* Davidson, 13 Minn. 449; Snell *vs.* DeLand, 43 Ill. 323; Smith *vs.* Wright, 5 Sandf. 113; Irvin *vs.* Railroad, 92 Ill. 100.

[4] N. Y. Penal Code, sec. 168.

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since it is *not* "injurious to trade or commerce" to keep the production of a commodity on an even line with its consumption. To prevent a "glut" in the market is to do an act beneficial to trade or commerce. Nothing can show this more clearly than the history of the very commodity over which the legal contest raged in Rex *vs.* Waddington, already cited. Any one acquainted with the violent fluctuation in the price of hops within the last few years cannot fail to have been struck with the mischievous consequences of an alternation between a glut and scarcity. When a glut comes, prices drop far below the cost of production. Farmers are frightened, plough up the vines, sell the poles at a sacrifice or burn them for firewood. A large part of the capital employed in the production of the commodity wholly disappears. A year or two later, the production having been greatly lessened, prices rise rapidly and unduly. Farmers, forgetting the severe lessons of the past, soon reach anew the point of over-production; a glut again ensues with the former result. Would it be "injurious to trade or commerce" for a set of producers to enter into an agreement when prices are low to withdraw from the market the excess in order to return it again when prices are high? Such a statute, accordingly, as has been named can have no application, unless where the act done is directly calculated to injure trade or commerce and is of such a nature that it can reasonably be inferred that there was an *intent* to do the injury complained of. (3) The trust agreement is not void as an alleged restraint upon trade, and is binding as between the parties to it.

The case of Marsh *vs.* Russell[1] is of importance in this connection. A, B, C and D, expecting to enter into a contract with several towns in one of the counties of New York to fill the quota of the towns under an anticipated call of the government for volunteers, agreed between themselves to form a partnership on the basis that no volunteer should be supplied by the firm to the towns for less than five hundred dollars, and that no individual member of the firm should furnish the quota of any town for less than that sum per man without the consent

[1] 66 N. Y. 288.

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of all the signers of the agreement. All gains and profits which might accrue in the business as well as losses were to be shared equally by the signers. An action having been brought for an accounting between the signers on the footing of a partnership, it was objected that the alleged partnership was on its face void as being opposed to public policy and therefore illegal. The court upheld the agreement. It conceded that the effect of the agreement was that the individual contracts of the members of the firm inured to its benefit and that no contract to furnish recruits should be made for a less sum than five hundred dollars ;[1] still, the court added, it did not appear that the parties had a monopoly of recruits, or that the towns were in any way obliged to get their recruits from them, or that the price charged was an unreasonable or unusual price, or that the parties did or could by their contract put up the price of recruits or embarrass the towns in filling their quotas; nor did it appear a necessary inference from the terms of the contract that the purpose of the parties was an improper or unlawful one or that its effect would be to thwart the policy of any law or to injure or jeopardize any public interest. It was further held that the business of furnishing recruits was a lawful one and could be carried on by individuals or firms; and that when carried on by a firm its members could regulate the price at which they would buy and sell, as they could if they had been dealers in other articles having a price. For example, if they had formed a partnership to buy or sell wheat, can it be doubted that they could lawfully agree in their articles of copartnership that neither member of the firm should come in competition with the firm and that wheat should not be purchased for more than a certain price, nor sold for less than a certain other price? Such an agreement would certainly not upon its face be unlawful and could only be condemned by proof that it was a part of a conspiracy to control prices or create a monopoly or that it was made for some other unlawful purpose."[2]

This clear and satisfactory statement of the law includes a "trust." As we have seen, it is but a great partnership, regu-

[1] *Ibid.* pp. 291, 292. [2] *Ibid.* p. 291.

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lating prices and imposing obligations upon all the members of it not to interfere with its regulations. What possible difference can it make, in philosophy or law, whether in making up a partnership a group of individuals enter into the firm as a group agreeing with another group or whether all enter individually? May not A, B, C and D acting as a group of persons contract with E, F, G and H considered as another group to constitute a firm as well as if the eight persons represented had had no prior business relations with each other? If so, we have substantially a "trust," and all that is so well said in Marsh *vs.* Russell is applicable.

An additional suggestion may properly be made. In Marsh *vs.* Russell some stress is laid upon the absence of secrecy as bearing upon the lawfulness of the agreement. It would seem that this could at most be but a make-weight in connection with other objectionable elements. It is not easy to perceive why a contract between private individuals, perfectly lawful and valid if made with publicity, can be unlawful and illegal without that element. It may, however, properly be a circumstance to be taken into account when the purpose of the contract is doubtful. It may fairly be questioned whether the members of "trusts" have not pursued a mistaken policy in resisting or retarding the efforts of legislative committees in attempting to obtain information as to the nature of their agreements. Since an agreement might perhaps be so drawn as to be "injurious to trade or commerce," full publicity should be given when inquiries of this kind are instituted. It might be well that the law should require that the agreement should be registered in an appropriate public office somewhat after the manner that it directs an agreement constituting a limited partnership to be filed, or bills of sale of goods or chattel mortgages to be recorded or filed.

II.

The next inquiry is: If it be conceded that "trusts" are lawful, being legitimate modes whereby producers may regulate prices, would preventive legislation be valid, or would it be opposed to the constitutional rule that a person is "not to be

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deprived of life, liberty or property without due process of law"? This clause appears both in state constitutions and in the United States constitution. The word "liberty," as here used, has been construed by the highest state authority to include "the right of a person to adopt such lawful industrial pursuit, not injurious to the community, as he may see fit." It includes the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation.[1] It is judicially declared that a liberty to adopt or follow lawful industrial pursuits in a manner not injurious to the community is not to be infringed upon, limited, weakened or destroyed by legislation. For such restrictive or destructive legislation good reasons must be given, based upon some ground affecting the public welfare. Such reasons are given for restrictions upon the sale of intoxicating liquors, for regulations conducive to the public health or other matters embraced within the elastic term "police power." But the line must be drawn somewhere; and the proper place to draw it is where the right to produce or to trade is restricted without any public advantage. A law cannot be justified simply by citing its own terms. An act does not become a nuisance by declaring it to be so. The objectionable element must exist as a matter of fact before the law is enacted to suppress it, and it must be sufficient to justify the law. Recent instances are an act prohibiting a seller from connecting with the sale of goods a gift of some advertised present, the object of the seller being to stimulate sales.[2] Another instance is a law prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses.[3] These and other cases show that in determining as to what is a proper exercise of the police power, an act of the legislature is not final or conclusive but is subject to the scrutiny of the courts.

The application of these authorities to the case in hand is obvious. If a "trust" entered into by a number of producers is now lawful as a reasonable and proper element in production,

[1] People *vs.* Gillson, 109 N. Y. 389, 398. with many cases cited on p. 399.
[2] People *vs.* Gillson, 109 N. Y. 389. [3] Matter of Jacobs, 98 N. Y. 98.

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it cannot properly be made unlawful by legislative acts of a stigmatizing character. To produce freely as individuals; to associate and act in concert with others; to stimulate production when there is a scarcity of commodities; to regulate it and restrain it when there is a glut,—these things, whether they be done by individuals or by combined action, are prime elements in "liberty" of trade. They are also constitutional rights, and when used with a due regard to the rights of others, are beyond the reach of hostile or repressive legislation. Though corporate charters should be arbitrarily repealed, in some form the liberty of association would survive to producers.

III.

If the states cannot properly legislate upon this subject so as to suppress trusts having in them no illegal purpose, the same remark is true of Congress. The authority of Congress over such a subject is in any event limited, and confined either to foreign commerce or that "among the states." Commerce within a particular state is not within its supervision. If it should essay to make an act of producers unlawful which is in its own nature lawful, its legislation would seem to be open to the same constitutional objection, as far as internal commerce among the states is concerned, as the legislation of a state; for the same constitutional restriction governs Congress, *viz.*: that it must not deprive a person within the country of "liberty or property without due process of law." This provision has already been sufficiently commented upon.

It would almost seem, when great trade questions like this of trusts begin to agitate the public mind, that statesmen stand in awe over the probable effects of the mighty power that they and their predecessors have done so much to create. We in the United States have certainly not been outstripped by any men of any nation in removing the shackles imposed by men of former days upon domestic trade and internal commerce. At the very birth of the nation we established in our domestic trade perfect freedom throughout the country. Ever since that time

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we have been developing domestic commerce on the lines indicated by our earliest statesmen. We have bridged mighty rivers, tunnelled broad mountains, traversed vast deserts, extended all forms of communication till the whole country, with all its varying local institutions and diverse economic interests, is for trade purposes a single state. Commerce and trade have overleaped state lines and have become national. Unrestrained power of production has been followed by an equally unrestrained and an equally beneficial liberty of association. The increase and growth of corporate power has been truly marvellous. The old notion of a corporate charter being a distinct gift of sovereign power, to be doled out to subjects with a sparing hand, has been practically abandoned. Corporate charters having a semblance of public benefit are granted for the asking. Ceasing to be mere privileges, they are looked on by business men as the machinery of trade and commerce and in that aspect a matter of right. But where a partnership or an unincorporated association will serve their purposes better than an incorporated company, they cannot see why they should not freely resort to machinery of that kind. They know well that, without profit, production will cease. Capital will then hide itself or be transferred to more enlightened countries where laws hampering trade have long since ceased to exist, and where freedom of internal trade means the removal of all useless clogs upon production. Forty years of legislative experience have taught the people of England that there is nothing to fear from combinations of producers when competition is absolutely free, and that no "conspiracy against the world" is possible.

Let us therefore be calm. "Trusts," as a rule, are not dangerous. They cannot overcome the law of demand and supply nor the resistless power of unlimited competition. They are, however, a sign of the times. The right of association is the child of freedom of trade. It is too late to banish it. As mercantile concerns under freedom of trade have tended in our cities to be more and more vast and comprehensive and absorb the smaller ones, so it is reasonable to suppose that the right of

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association will be made more and more available in manufacturing. In fact the two tendencies are in substance the same. If association is prevented by law, different manufactories may be melted into one. The only way out of the difficulty, if it be one, is to invade the right of property, limit production by law, cut down the employment of large capitals, and perhaps, in the end, hand over production to the state.

Are we ready for these things? All English-speaking people, we of the United States and the English in England have been engaged for a hundred years both in overcoming natural obstacles to internal trade and in abrogating absurdly restrictive laws. It is not to be credited that we shall commit the supreme folly of resorting to mischievous legislation, fully tried and long since abandoned.

THEODORE W. DWIGHT.

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THE LAW OF THE ELECTORAL COUNT.

THE most complicated bit of governmental machinery which the modern world has to exhibit is that which is employed in the selection of the chief executive officer and his possible substitute for the United States. A glance at the constitutional and statutory provisions governing this subject will reveal the fact that, from the single standpoint of the powers conspiring to produce the result, at least seven distinctions must be made in the procedure:

(1) The constitution itself prescribes in detail a certain part of the process.[1]

(2) The constitution commands the Congress (or one House or some officer thereof) to execute a certain other part of the process.[2]

(3) The constitution orders the states to carry out a certain other part of the process.[3]

(4) The constitution authorizes the Congress (or leaves it to the Congress) to execute (or provide for the execution of) still another part of the process.[4]

(5) The constitution authorizes (or leaves it to) the states to provide for and execute still another part of the process.[5]

(6) The Congress has laid certain duties upon the states (or an officer thereof) in the execution of another part of the process.[6]

(7) The Congress has conferred certain powers upon the states to provide for still another part of the process.[7]

It is almost marvellous that any people should have preserved political unity for a century under such a loose and decentralized system of election of its chief magistrate. It is certainly

[1] Art. 2, secs. 2 & 4; art. 12, secs. 1 & 2.
[2] Art. 12, secs. 1 & 2.
[3] Art. 2, sec. 2.
[4] Art. 1, sec. 8, § 18; art. 2, sec. 4; art. 12, sec. 1.
[5] Art. 2, sec. 2.
[6] U. S. Statutes at Large, vol. 24, chap. 90, sec. 3, p. 373.
[7] U. S. Revised Statutes, secs. 133, 134.

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an indubitable evidence of great popular self-control; especially when we consider that neither the Congress nor the states have, until very recently, worked out with any degree of fulness and precision the parts of the electoral process assigned to them (or left to them) by the constitution. In fact, our jurists and statesmen have greatly disagreed and do still greatly disagree as to what the constitution does assign or leave to the Congress on the one hand and to the states upon the other. At last, however, the view seems to have prevailed that what the constitution does not itself regulate, or order or authorize the Federal government or some branch thereof to regulate, or order the states to regulate, or authorize the Federal government to order the states to regulate, is left to the states in full discretion; and that what the constitution authorizes the Federal government to regulate, without designating which branch thereof is thus empowered, is to be regulated by the usual course of legislation, *i.e.* by an act passed by both Houses of the Congress and approved by the President or, if not approved by the President, repassed by a two-thirds majority of each House. These are the principles upon which the Electoral Count law[1] of February 3, 1887, rests, whose provisions it is the purpose of this paper briefly to explain.

The first section of the law changes the day for the meeting of the electors and the giving of their votes from the first Wednesday in December succeeding their appointment to the second Monday in January succeeding their appointment. The reason for this change becomes obvious upon reading the second section of the law. It is to give the states ample time for determining any dispute concerning the election of its electors or any of them before the day appointed for their meeting and voting. There is no question that Congress has the constitutional power to make this change. The fourth section of the second article of the constitution expressly confers it. There is, furthermore, no question about the wisdom of this change, viewed from the standpoint of the principle of the law, that the states should, if possible, determine finally all questions relating to the election of the electors.

[1] U. S. Statutes at Large, vol. 24, chap. 90, pp. 373 *et seq.*

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The second section of the law is the groundwork, so to speak, of the whole system of the count. It is, however, curiously couched in hypothetical language. It reads:

That if any state shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such state, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such state is concerned.

This language reveals at the outset an excessively states-rights view of the whole subject. It will be seen that the Congress does not command the states to provide for a determination of the controversies or contests that may arise concerning the appointment of the electors, does not even declare it to be the duty of the states to do so, but simply holds out an inducement for them so to act. The precursors of this law, the bills passed by the Senate in the forty-seventh and forty-eighth Congresses, expressed this clause in a little different language. They read:

That each state may, pursuant to its laws existing on the day fixed for the appointment of the electors, try and determine, *etc.*[1]

This form of words was at once resented by the leaders of the majority in the House. Mr. Eaton, the chairman of the House committee to whom the Senate bill had been referred, denounced most vigorously this mild little word "may" as containing a most violent encroachment by the Congress upon the rights of the states.

Now, by what authority [he exclaimed] does this Congress undertake to tell your state, my friend, how it shall choose its electors and determine whether they are electors or not? By what authority does this Con-

[1] *Congressional Record*, vol. 13, p. 859; vol. 15, p. 5076.

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gress undertake to legislate for New York and Alabama and Louisiana and Connecticut and Maryland in a matter that belongs alone to New York and to Maryland and to Connecticut and to Alabama and to each and every of the other states? The constitution says so? Now, let us look at it. See how easy it is for distinguished gentlemen to fall into mistakes. I read from article 2, section 2: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator," *etc.* Now, that is the constitutional law. But that is not all of it. Turn over to paragraph 3 of the same section and what do you find there? The only power that Congress has is here: "The Congress" — may do what? After the state has done its duty, "The Congress may determine" — what? "The time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States." That is all the power. The very keeping of that power excludes every other idea of power. Every other idea of power belongs to the states, is in the states. And yet the Senate have given us a bill here in which they undertake to determine, with regard to the electors of states, who are properly elected, which is the duty of the state under the constitution.[1]

It was to no purpose that Mr. Browne reminded Mr. Eaton that this section of the Senate bill did nothing more than declare what evidence the Congress would receive as *conclusive* of the fact of the selection of particular electors by the state.[2] Mr. Eaton insisted upon his view of the subject and the House followed him. In the substitute which he offered for the Senate bill this section was entirely stricken out.[3] This substitute was passed by the House June 24, 1884,[4] and transmitted to the Senate. The Senate rejected the substitute and proposed a conference, which was accepted by the House. The committees of conference failed however to agree,[5] and the bill fell through. When it reappeared in the Senate of the forty-ninth Congress, this section which had so offended the states-rights sensitiveness of the majority of the House was expressed in the hypothetical language above cited.[6] Still the particularists were not satisfied. The provision required that the determination of the

[1] *Congressional Record*, vol. 15, p. 5078. [2] *Ibid.* [3] *Ibid.*, vol. 15, p. 5076.
[4] *Ibid.*, vol. 15, p. 5551. [5] *Ibid.*, vol. 16, p. 1618. [6] *Ibid.*, vol. 17, p. 2387.

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controversy or contest should be made at least six days before the day fixed for the meeting of the electors and should be made according to laws enacted prior to, and in force upon, the day fixed for the appointment of the electors. When this new bill reached the House at the beginning of the second session of the forty-ninth Congress, Mr. Dibble attacked this clause and declared that up to "the day when the electors are to cast their votes, the state power as to appointment cannot be interfered with in any manner, shape or form by the Congress of the United States, or by any other power."[1] The majority of the House was however finally made to comprehend that this provision was no interference by Congress with the right of the states to appoint their electors in such manner as they might determine, but was only a notice to the states as to what evidence Congress would accept from a state as *conclusive* in case a contest should arise in that body concerning the counting of the electoral vote of a state.

Regarded from a purely scientific standpoint, one must consider the provision to be still an ultra and an unwise concession of power to the states. No determination which a state can produce should be made *conclusive* against the judgment of both Houses of Congress in the counting of the electoral vote. In matters like this, the concurrent judgment of the two Houses of the Congress is the surest interpretation of justice and right which our political system affords; and the claim that they have no constitutional right to determine the legal genuineness of any electoral vote sent to them under any form of certification by any state, on the ground that the constitution vests the appointment of the electors wholly in the state, confounds the process of the appointment or election with that of the count, and seeks to rob the power of counting of its most important element, *viz.*, the power of ascertaining what is to be counted. The constitution either vests in Congress the power to count the electoral vote or the power to provide by legislation for counting it. If the former alternative is true, then Congress cannot by legislation divest itself of the power of ascertaining and determining

[1] *Ibid.*, vol. 18, p. 46.

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what is to be regarded as the true electoral vote of a state. If the latter alternative is true, then Congress may indeed by legislation designate a state tribunal or authority and vest the same with the power to determine, in first and last instance, all controversies and contests in regard to the appointment of electors; but it would be most unwise to do so. Such a rule must be grounded upon the supposition that only the state in which the controversy or contest occurs has any important interest in its determination. It is the same sort of folly that was contained in the compromise measures of 1850, when it was imagined that the slavery question could be put to rest by putting its discussion out of the Congress.

The great majority of the supporters of this law in both Houses of the Congress based their action upon the principle that the two Houses of the Congress, acting concurrently, were by the constitution vested with the power of counting the electoral vote. If this be the true principle, then the position taken by Mr. Adams in the House must be regarded as sound, *viz.*, that Congress cannot by legislation relieve the two Houses of a duty imposed upon them by the constitution; that the utmost that the Congress can do by legislation, under this view of the constitution, is to provide for the case of a disagreement between the two Houses.[1] We cannot go skipping about from article 1, section 8, paragraph 18, to article 12, section 1, undertaking to apply them both to the same subject or to the same parts of the same subject. The two provisions require a different action on the part of the Congress and cannot be employed indiscriminately. The Senate sought to defend itself against the idea, which prevailed largely in the House, that Congress could by law vest the counting of the electoral votes in a consolidated assembly consisting of the members of the two Houses voting per capita, by holding that the constitution imposed the duty of counting upon the two Houses acting separately and concurrently; and yet the Senate passed this bill, which (as to this section) can only be justified upon the ground that the constitution vests in Congress the right to provide by law for the

[1] *Congressional Record*, vol. 18, p. 52.

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counting of the vote, but does not impose the duty of counting immediately upon the two Houses themselves. Surely we discover here some of the confusing effects of the experiences of "'77" upon the consciences of those to whom the people have a right to look for the preservation of all the powers conferred by the constitution upon the general government.

The next section of the law, the third, provides for making officially known to the United States government and to the general public the procedures in the states in the choice of the electors and in the determination of any controversies or contests thereover which shall have arisen, and for the certification to the persons chosen of their electoral authority. It makes it the duty of the executive of each state to transmit, under the seal of the state, to the secretary of state of the United States, so soon as practicable after the conclusion of any of these procedures, full information in regard to the same. The certificate of ascertainment of the electors appointed must contain "the names of such electors and the canvass or other ascertainment, under the laws of such state, of the number of votes given or cast for such person for whose appointment any and all votes have been given or cast."[1] The certificate of determination of any controversy or contest must contain an account of the same "in the form and manner as the same shall have been made."[2] The secretary of state of the United States is required to publish in full any and all of such certificates, so soon as practicable after their receipt, in such public newspaper as he shall designate; and at the first meeting of Congress thereafter to transmit to the two Houses of Congress full copies of all such certificates.[3] In the second place, this section of the law requires the executive of the state to deliver, under seal of the state, to the persons chosen electors of the state, on or before the day upon which they are required to meet, three copies of the certificate of ascertainment above mentioned, which the electors shall inclose with the votes given by them for President and Vice-President, and transmit to the seat of government at the same time and in the same manner

[1] U. S. Statutes at Large, vol. 24, chap. 90, sec. 3, p. 373. [2] *Ibid.* [3] *Ibid.*

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as is provided by law for the transmission by them of the lists of all persons voted for as President and as Vice-President. The provision of existing law here referred to is section 140 of the Revised Statutes of the United States, which reads:

> The electors shall dispose of the certificates thus made by them in the following manner:
>
> *One.* They shall, by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the president of the Senate, at the seat of government, before the first Wednesday in January then next ensuing, one of these certificates.
>
> *Two.* They shall forthwith forward by the post-office to the president of the Senate, at the seat of government, one other of the certificates.
>
> *Three.* They shall forthwith cause the other of the certificates to be delivered to the judge of that district in which the electors shall assemble.

It will be seen that the new law thus orders the certificates of ascertainment, furnished by the state executive to the electors, and the lists of the electoral votes cast by them, to be transmitted to the seat of government before the first Wednesday in January; while by the first section of the new law, as we have seen, the electors do not meet and give their votes for President and Vice-President until the second Monday of January. Moreover the language of the new law does not inform us whether one of these certificates with one of these lists of the electoral votes is to be left with the district judge. These oversights have apparently just been discovered by our national legislators. A supplementary act was rushed through the Congress during the last days of the session just ended, and approved by the President October 19 (1888), which provides:

> That the certificates and lists of votes for President and Vice-President of the United States, mentioned in chapter one of title three of the Revised Statutes of the United States, and in the act to which this is a supplement, shall be forwarded in the manner therein provided, to the president of the Senate forthwith after the second Monday in January, on which the electors shall give their votes.
>
> That section 141 of the Revised Statutes of the United States is hereby so amended as to read as follows: Whenever a certificate of

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votes from any state has not been received at the seat of government on the fourth Monday of the month of January in which their [*i.e.*, the electors'] meeting shall have been held, the secretary of state shall send a special messenger to the district judge in whose custody one certificate of the votes from that state has been lodged, and such judge shall forthwith transmit that list to the seat of government.

That provision of the law (in the fourth section) which refers to the transmission of certificates from the executive of the state to the secretary of state of the United States was not contained in the bill when it appeared in the Senate at the beginning of the forty-ninth Congress, but was introduced into it as an amendment at the instigation of Mr. Evarts.[1] It is well enough, but it loses the greater part of its significance and value if the determinations made by the state are to be conclusive upon the Congress. The less time the Congress has to ruminate upon these certificates the better, if they cannot be set aside.

If the power of Congress to impose duties upon the executives of the states had been a new question at the time of the enactment of this law, I think (judging from the expressions of many members of the House) that a strong resistance to this part of the provision would have been developed; but, thanks to a kindly fate, it was asserted as far back as 1792, when men sat in both Houses of the Congress who knew what the constitution meant,[2] and were disposed to execute it.

The first three sections of the law are thus directed to the regulation of the preliminaries to the count. The fourth provides for the actual process.

(1) It fixes the time of the meeting of the Congress for the count at one o'clock P.M. on the second Wednesday in February succeeding the meeting of the electors. (2) It designates the place as the hall of the House of Representatives. (3) It ordains that the bureau of organization shall consist of the president of the Senate as the presiding officer and four tellers, two appointed by each of the Houses previous to their joint

[1] *Congressional Record*, vol. 17, pp. 1057, 1759.
[2] U. S. Statutes at Large, vol. 1, chap. 8, sec. 3, p. 240.

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meeting. (4) It orders that the president of the Senate shall open all certificates and papers purporting to be certificates in the alphabetical order of the states, beginning with the letter A, and shall hand them to the tellers; (5) that the tellers shall read the same in the presence and hearing of the two Houses; and (6) that upon the reading of any such paper the president of the Senate shall call for objections, if any. (7) It provides that all objections shall be made in writing, shall state clearly and concisely and without argument the ground thereof, and, in order to be received, must be signed by at least one member from each House. (8) It commands that, after all objections so made to any vote or paper from a state shall have been received and read, the Senate shall thereupon withdraw from the hall of the House of Representatives and, in separate meeting, consider and decide upon the received objections; and that the House of Representatives shall likewise, in separate meeting, consider and decide upon the received objections. (9) It orders that, when the two Houses have voted upon the question or questions contained in the received objections, they shall immediately meet, and the presiding officer shall then announce the decision of the questions submitted. (10) It prescribes that no electoral vote or votes from any state from which *but one* return has been received shall be rejected, provided the same shall have been given by electors whose appointment has been certified to in the manner prescribed in section 3, above explained, and provided the votes given by such electors shall have been *regularly* given; but that in case both Houses of the Congress shall have decided, by separate vote, that the electors making the return have not received the lawful certification prescribed in section 3, or have not given their vote or votes for President and Vice-President *regularly*, then such vote or votes may be rejected by the concurrent resolution of the two Houses. (11) It prescribes that, in case *more than one* return or paper purporting to be a return shall have been received from a state by the president of the Senate, and a determination as to who are the true electors of the state shall have been reached by an authority or tribunal within the state, as

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described in section 2 of this act, then that return shall be received and the votes contained therein counted which have been given by those electors, or their lawful substitutes or successors, whom such determination shows to have been appointed; provided the votes of these electors for President and Vice-President shall have been *regularly* given. It is not expressly stated in this period of the section that, if the two Houses in separate assembly decide that such electors have not given their votes regularly, they may by concurrent action reject these votes, though it is to be presumed that such is the meaning of the law. The language of this paragraph is very confused, almost unintelligible; and since we have as yet had no actual precedents of interpretation, there are several points concerning which our predications cannot claim the attribute of certainty. (12) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a state by the president of the Senate, and conflicting determinations as to who are the true electors of the state shall have been made by different authorities or tribunals within the state, each claiming to be the true authority or tribunal, as described by section 2 of this act, then the two Houses of the Congress, acting in separate assembly, may by concurrent agreement determine which are the true and legal electors of the state; but if they disagree as to this, then the vote of the state shall not be counted. Here again it is not expressly stated that, if they agree upon the persons to be regarded as the lawful electors of the state *and also* agree that they have not given their votes regularly, they may by concurrent resolution refuse to count the vote of the state, though this is again to be inferred. (13) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a state by the president of the Senate, and no determination as to who are the electors of the state shall have been made in the state as provided in section 2 of this act, but one set of the electors making a return of the electoral votes of the state shall have the certificate of the executive of the state, under the seal thereof, to their appointment, then the

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votes given by such electors shall be counted, unless the two Houses in separate assembly decide by concurrent resolution that such electors are not the lawful electors of the state or have not given their votes regularly or lawfully for President and Vice-President. In this case the two Houses may, furthermore, by concurrent resolution declare the electors not furnished with the certificate of the executive of the state to their appointment, to be the true and lawful electors of the state, and the votes of such electors must be counted unless the two Houses concurrently resolve that these electors have not given their votes *regularly* for President and Vice-President and decide concurrently to reject them. (14) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a state, by the president of the Senate, and no determination as to who are the electors of the state shall have been made in the state as provided in section 2 of this act, and neither set of the electors making returns shall be furnished with the certificate of the executive of the state to their appointment, then the two Houses may, acting separately, by concurrent resolution determine who are the lawful electors of the state, and the votes of such electors shall be counted unless the two Houses by concurrent resolution decide that such electors have not given their votes regularly or lawfully for President and Vice-President and resolve to reject the same. If, in this case, the two Houses cannot agree as to who are the lawful electors of the state, no vote or votes from the state can be counted. (15) Lastly, it commands that the tellers shall make lists of the votes as they shall appear from the certificates as opened by the president of the Senate, when no objections are made, and as they shall appear from the decisions of the two Houses made according to this law and announced by the presiding officer upon reunion of the two Houses, when objections have been duly raised; and that the votes, having been ascertained and counted in the manner and according to the rules provided in this act, shall be delivered to the president of the Senate, who shall thereupon announce the state of the vote, which announcement shall be

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deemed a sufficient declaration of the persons, if any, elected President and Vice-President, and together with a list of the votes shall be entered on the journals of the two Houses.

The first thing which strikes the uninitiated reader of this section as strange and peculiar is the apparently changeable organization of the Congress when counting the electoral vote, and when hearing it counted. Apparently, when listening to the count, Congress is a joint national assembly, consisting of the members of the two Houses. One person is made the presiding officer. He is called sometimes the president of the Senate, but sometimes also simply the presiding officer. He is vested with the power to keep order in the united assembly, and he reads the decisions (upon objections to votes) which both the House of Representatives and the Senate make in separate assembly. On the other hand, so soon as the passive state is laid aside and the active assumed, this apparently simple body becomes two bodies with independent and possibly conflicting wills and organs. I know of nothing in nature to which one may liken this strange organization, except the Siamese twins; and I marvel that it has not yet obtained the convenient and perfectly descriptive epithet of the Eng and Chang Congress. This monstrosity is the product of two principles of constitutional law belonging to different genera. The one is the proposition that the constitution itself provides for the counting of the electoral vote; and the other is that the constitution vests in Congress the power to provide by legislation for the count of the vote. The first proposition, although Senator Sherman [1] gave the great weight of his opinion against it, was supported by the Senate as its defence against the tendency of the House to organize, by legislation, a single body for counting the electoral vote, consisting of the members of the two Houses, in which the senators would be overwhelmed by the far more numerous representatives. The second proposition was held by a large party in the House, large enough to carry through the House in the forty-eighth Congress a bill to constitute the two Houses a joint convention to count the electoral vote; [2] although during the course of the debate upon the

[1] *Congressional Record*, vol. 17, p. 817. [2] *Ibid.*, vol. 15, pp. 5076 and 5557.

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bill both Mr. Eaton and Mr. Pryor abandoned their own constitutional ground, and undertook to turn the argument of the Senate against itself by occupying the Senate's position. Mr. Eaton declared that in his opinion the constitution vests in the House of Representatives the power to count the electoral vote in case of dispute,[1] and Mr. Pryor asserted that the constitution creates a joint convention of the two Houses for this purpose.[2] The only wonder is that we did not get a set of articulated triplets, instead of twins, out of this miscegenation of parent ideas.

It seems to me that the constitutional principle upon which the House bill rested is the true one, *viz.*, that the constitution does not itself expressly provide for deciding disputes in regard to the counting of the electoral votes, but vests in Congress the power to provide for the case by legislation. Article 1, section 8, paragraph 18, reads :

> The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

This was the view taken by Senator Sherman. Senator Garland also declared that in his opinion the constitution does not specifically and expressly provide for determining disputes in regard to the count of the electoral votes ;[3] but his extreme states-rights political science would not permit him to accept the doctrine that the constitution generally and impliedly vests in the Congress the power of making provision for their determination. His view was that what is not to be found specifically and expressly in the constitution must be put there by constitutional amendment. This has an honest ring, but with our present method of amending the constitution it simply means stagnation. It simply means that our public law shall never keep pace with the developments and requirements of our political science. It means the accumulation of error until

[1] *Congressional Record*, vol. 15, p. 5548. [2] *Ibid.*, vol. 15, p. 5102.
[3] *Ibid.*, vol. 13, p. 2648.

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nothing short of revolution can correct it. It means the congestion of the body politic until nothing but blood-letting can relieve it. It is therefore the *petite morale* over against the *grande morale.* His brethren in the House certainly manifested greater statesmanship than he upon this subject. His first proposition is, however, undoubtedly true, *viz.*, that the constitution does not specifically and expressly provide for determining the conflicts over the electoral returns. It is certainly impossible that the framers of the constitution could have provided expressly and specifically for the determination of disputes the causes of whose origin they could not have foreseen, and to attribute such prescience to them is nothing but chauvinistic piety. We all know that while the form of the electoral system which they created remains, the substance of it has become completely changed, and that it is from this change that these disputes and controversies arise. The framers of the constitution undoubtedly meant that the president of the Senate should count the electoral votes, but in making the count they did not think of anything more than mere enumeration. They did not think of his ever being placed under the necessity of ascertaining what should be counted. They were, however, wise enough to know that they could not foresee all things, and therefore they wrote in the constitution that Congress should have power to make all laws necessary and proper to carry into execution all powers vested by the constitution in the government of the United States or in any department *or officer thereof.* A sound interpretation of this clause cannot fail to accord to the Congress the power to make laws for carrying into execution this general and undefined power of the president of the Senate to count the electoral votes. Congress may therefore, by a law, create any tribunal it will for the determination of controversies and conflicts in the counting of the electoral votes and make such determinations binding upon the president of the Senate in the enumeration of the votes.[1] Whether that tribunal shall be the two Houses of Congress acting independently, or a convention composed of the members of the two Houses of Con-

[1] Kent's Commentaries (12th edition), vol. 1, p. 295.

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gress or an equal number of representatives from the two Houses, or a court already in existence or created for the purpose, or any other body, — Congress may, nay, must determine by an act of legislation. It is only a question of practical politics, and not at all of constitutional powers.

The failure of the Senate to comprehend, or its determination to ignore, this view (and I think it was the latter) is what has produced the mixed and confused methods and procedures provided in this fourth section of the law under our consideration.

When we come to examine these provisions in detail, we find several measures of very questionable wisdom and several points still left unsettled.

(1) The rule that the determinations made by a state tribunal or authority in regard to controversies and contests concerning the appointment of electors cannot be reversed by the concurrent acts of the two Houses appears to me to be an unwise measure. I have already criticised this provision under the review of the second section (pages 637, 638).

(2) The rule that no electoral vote or votes from any state from which but one lawful return has been received shall be rejected seems to me to surrender too far the control of Congress over the counting of the vote. It is altogether conceivable that a state may make but one return, and yet that, in the election of the electors who sign the same, notorious fraud and terrorism may have carried the day. This rule cannot be justified except upon the principles that the purity of presidential elections is matter solely or at least chiefly of state concern, and that the state consciousness of right and wrong in reference to this subject is rather to be trusted than the national. It seems to me that such principles need only to be stated to be rejected. The constitution expressly provides a grave penalty for any such procedures within a state, and imposes upon Congress the duty of securing the execution of the same.[1] When the bill went from the Senate to the House it contained the proper modification of this rule. It provided that the concurrent act of the two Houses should prevail against a single return,[2] but the House struck out

[1] Art. 14, sec. 2.

[2] *Congressional Record*, vol. 18, p. 29.

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the modification and insisted upon the amendment as one of the indispensable conditions of its agreement to the bill.[1] It will be remarked, however, in connection with this provision, as with the previous one, that the law authorizes the two Houses by concurrent resolution to reject the votes of the electors for President and Vice-President if they agree that these have not been *regularly* given; *i.e.*, the two Houses cannot reject the return on account of fraud or defect in the election of the electors or in the determination of a controversy thereover, but may do so on account of irregular action on the part of the electors themselves in giving their votes for President and Vice-President. It leaves the power implicitly in the two Houses by concurrent resolution to determine wherein irregularity shall consist. This distinction is certainly a valuable one. It would be an unendurable surrender of the powers of Congress so to bind the two Houses that they could not by concurrent act prevent, for example, the electors from choosing a person for the presidency who should not have the qualifications for the office prescribed in the constitution.

(3) The rule that, in case of conflicting returns and no determination made by the state according to the provisions of section 2 of the act, the certificate of the state executive shall be held conclusive as to who are the true electors of the state, unless the two Houses shall by concurrent act resolve the contrary, is too liable to abuse. It gives too much power over the presidential election into the hands of the state executive. He could easily procure the transmission of conflicting returns and then, in case of a difference of view in the two Houses, determine between them as to which should be received. The state executives have not shown themselves sufficiently immaculate to be intrusted with powers so easy of manipulation. This provision did not exist in the bill as it went from the Senate to the House, but was introduced as an amendment by the House and made another *conditio sine qua non* of its acceptance of the bill at all.[2]

(4) The rule which allows either House, in case of two or

[1] *Ibid.*, vol. 18, p. 77. [2] *Ibid.*, vol. 18, pp. 30, 49, 77.

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more returns made by two or more sets of electors, each authorized by determinations made professedly in accordance with the second section of the act, to reject the vote of the state, is one of doubtful wisdom. When the bill was in the Senate, Mr. Evarts pointed out the fact that this provision would inure to the undue advantage of the House whenever the loss of the vote of the state affected the election, since the House could, by throwing out the vote of the state, bring the election into its own hands.[1] This condition of things could easily be manufactured, of course; and a House so disposed could easily be enabled to defeat an election by the electors and substitute its own choice therefor. Mr. Hoar suggested that this could not happen, since, if the votes from a state should be thrown out, they must be deducted from the whole number of electoral votes in calculating the majority necessary to a choice. The result of this might be the election of the other candidate by the electors, but it could not be to bring the election into the House of Representatives.[2] But the assertion of Mr. Hoar that, when the votes of a state are thrown out, they are to be deducted from the whole number of the electoral votes in calculating the majority necessary for a choice was not at the moment, and is not now, the fixed and certain law of the land. It was only his conjecture, while Mr. Evarts, an equally weighty authority in the interpretation of constitutional law, held, as we have seen, the contrary view. Mr. Morgan suggested that the House might be deterred from such an act by the fact that the members from one more than one-third of the states can, under the constitution, prevent a quorum for the election of the President from assembling, which would result in making the person chosen by the Senate as Vice-President, the President.[3] But this again is crude. The constitution provides that a quorum of the House of Representatives to elect a President shall consist of members *or a member* from two-thirds of the states.[4] Practically no Congress would be so constituted as to party affiliations that all the members from one more than one-third of the states

[1] *Congressional Record*, vol. 17, p. 820.
[2] *Ibid.*, vol. 17, p. 821.
[3] *Ibid.*, vol. 17, p. 867.
[4] Art. 12, sec. 1.

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would be opposed to a majority of the members from each of one less than two-thirds of the states. The criticism upon this case will apply equally to the case where either House may prevent the counting of the vote of a state from which several returns have been presented, when no determination has been made in the state according to section 2 of this act, and neither set of the electors making returns is furnished with the certificate of the executive of the state concerned.

(5) The law fails to cover at least two points. It does not provide for the case where two persons, each claiming to be the true executive of the same state, issue certificates to different sets of electors, and no determination according to section 2 of the act shall have been made in the state. The analogies of the cases provided for would lead us to infer that the vote of the state should be rejected unless the two Houses acting separately could agree as to which return should be counted; but this is only conjecture. Furthermore, no provision is made in the law as to whether, when the vote of a state is rejected, it is to be deducted from the whole number of electoral votes to which all the states are entitled, in determining the majority necessary to choose the President. The constitution declares that the majority necessary to elect shall be that of the whole number of electors appointed.[1] If, when the vote of a state is rejected, it is to be assumed that the state has not appointed any electors, then it would seem that such state should not be regarded in computing the majority necessary to a choice; but this again is conjecture. When two such able lawyers as Senators Evarts and Hoar disagree, as I have pointed out above, in regard to this matter, it certainly is to be concluded that there is necessity for greater clearness and exactness upon this point.

The last three sections of the law, the fifth, sixth and seventh, prescribe rules of procedure in the joint meeting and in the separate meetings of the two Houses. The purpose of these is to prevent the protraction of the count beyond the day for the inauguration of the new President, *i.e.*, to prevent interreg-

[1] Art. 12, sec. 1.

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num. They ordain that, in the joint meeting, the president of the Senate shall have power to preserve order, and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw; that such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the results declared; that when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any state, or other question arising in the matter, either House may direct a recess until ten o'clock A.M. of the next calendar day, Sunday not counted, but if the counting of the electoral vote and the declaration of the result shall not have been completed before the fifth calendar day next after the first meeting of the two Houses, no further or other recess shall be taken by either House; that, in the separate meetings of the two Houses, each senator and each representative may speak to the objection or question not more than once and for not longer than five minutes, and that such debate shall not be permitted for a longer time than two hours, upon the expiration of which time it shall be the duty of the presiding officer of each House to put the main question without further debate. There is also provision for the seating of the two Houses and their officers, which need not be recited for our purpose.

These regulations are apparently exhaustive. So far as human wit can divine, they will probably prevent any failure of the Congress to reach its decision in regard to the counting of the electoral votes before the expiration of the existing presidential term, *i.e.*, they will remove this possibility of interregnum which, in one case at least, seriously threatened to occur.

There is no doubt that the law disposes, in a complex and clumsy way indeed, of some of the difficulties in the counting of the electoral votes. It is not quite so bad as represented by one member of the House, who said, if I remember correctly, that if, considering the period of its incubation and the labor with which it had been brought forth, he should apply to it the old Horatian line, "*parturiunt montes, nascitur ridiculus mus*," he thought he should be doing grave injustice to the mouse. But

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it cannot be regarded as a solution in principle of this great question. It is a makeshift, at best a compromise. Senator Hoar himself, who, with Senator Edmunds, may be regarded as the originator of this law, conceded that a perfect regulation of this subject would require a common arbiter between the two Houses of the Congress and agreed that the constitution confers upon the Congress the power to establish such an one by law; but he cited the failure of all attempts as yet made upon that line and concluded that practically it is impossible to secure any such provision.[1] The truth is, we want a new baptism of nationalism all around. Let us hope that it will not again be one of fire.

JOHN W. BURGESS.

[1] *Congressional Record*, vol. 17, p. 1020.

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THE BALLOT IN ENGLAND.

I. *Its History.*

IT is a singular historical fact that the English ballot act should have recently attracted so much attention in the United States. For nearly half a century of English political controversy the ballot was regarded as a distinctly American institution and it was advocated or resisted by arguments drawn from the experience of its working and the opinions of English travellers. To call such a method of voting "American" was, in the judgment of hysterical patriots, to condemn it. Under present conditions in the United States, it appears to be a strong argument in favor of a particular method of voting that it is "English." Bills based upon the English ballot act have been recently brought into the legislatures of New York, Massachusetts, Wisconsin, and Michigan. Wisconsin and Massachusetts, indeed, have passed acts in several respects patterned on the English act. American visitors to England have agreeably surprised their friends here by the interest they have manifested in the ballot, and by the minuteness of their inquiries respecting it. Under these circumstances, it seems desirable to give an historical review of the ballot in this country, without which the form and working of the act of 1872 cannot be properly understood, to indicate the points upon which it has been so eminently successful, and to deal with one or two practical matters in the adaptation of the English system to American conditions.

The history of the ballot in England has never been written, and this fact will excuse some careful details. Classical scholars had long been familiar with the ballot as practised in Greece and Rome, but it was regarded with no more antiquarian interest than other parts of a political system men could never think of attempting to revive. The voting urn, in fact, was about on the same practical level as the urn which contained the ashes of the dead. The first political use of the ballot-

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box was in a Westminster coffee-house club in 1659.[1] With trifling exceptions, the rule at political clubs, since that date, has been to vote by ballot-balls in the election of members; and many sturdy opponents of the ballot in parliamentary contests have been so elected, without any protests or without any misgivings, to the respective clubs they frequented. The Earl of Shaftesbury was about the only person who noticed the absurdity, and experienced any conscientious scruples. In the debate on the ballot schedule of the elementary education act, in 1870, he said, "He detested secret voting. He had never blackballed a man but once, and then he told him of it immediately afterwards.[2]

The earliest use of the ballot in Parliament was not in England but in Scotland. In the reign of Charles II, Middleton proposed the plan in order to disqualify officials on account of their political history, and to secure individual freedom. The billeting act of 1662–4 prescribed a singular method.

> First, every member of Parliament was to write with a borrowed hand the names of twelve persons, and these were to be given in to the Register, who was to hold a bag at the foot of the throne, wherein these billets were to be thrown, after which the bag was to be sealed, and to be carried up to the Exchequer Chamber, where they were to be compared, and after the number was agreed upon the billets were to be burned, and the names of such as were billeted to be concealed on oath, which form was thereafter punctually observed — only the Register having a deep-rooted quarrel against Southesk, did mark his billet with a nip when he received it, and thereby discovered his vote.[3]

The act was repudiated by the King, and the ballot was not again heard of until 1705, when Fletcher, of Saltoun, in his measure for a provisional government of Scotland by annual parliaments, in the event of Queen Anne's death, proposed secret voting for the protection of members from court influence. Middleton had supported his act by Greek models. When the ballot was next advocated, the "prerogative instance" cited was that of the republic of Venice. Andrew Marvell, the poet, and member for Hull, wrote a tract entitled: *The Benefit of the*

[1] *Cf.* Theodore W. Dwight, Harrington, POLITICAL SCIENCE QUARTERLY, II, 20.
[2] Parliamentary Debates, vol. 203, 3d series, p. 1193.
[3] Mackenzie, quoted in Burton's History of Scotland (2d ed.), vol. 7, pp. 163, 164.

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Ballot, with the Nature and Use thereof, Particularly in the Republick of Venice. It was privately printed in Charles II's reign, and afterwards reprinted with other tracts. The author laid down as his introductory propositions the following:

> Where the Balloting is us'd those States are most free from Factions and Rebellions. There, Persons of the most accomplish'd Parts are advanc'd for their Integrity and Worth. There, Vertue is a speedy ladder to climb into Honour.

He described the Venetian method of balloting, by balls of linen, and his concluding comment is worth quoting:

> All is very easily perform'd in a short time, without noise, without tumult, without animosities, and the most deserving is always elected.[1]

Nothing further was written on the subject, or indeed heard about it, until 1710, when an effort was made, which is but obscurely hinted at, to introduce secret voting into parliamentary elections, in order to limit the number of placemen in the House of Commons. The country swarmed with needy and greedy officers, out at elbows, and liberated from employment by the cessation of military operations. The bill has no author's name attached to it, and the speech reported in defence of it is given without any reference. But here is its powerful argument:

> The corruption of the boroughs is grown to such a height, it is so easy to procure a return, and such a latitude is left by the variety of our own determinations, that whenever any set of ministers think fit to exert themselves, they may bring in so many military officers as, together with those who have civil employments, may make up a majority.[2]

The Commons passed the bill, but it was "unanimously rejected" by the House of Lords. For nearly a hundred years there is a blank, as far as the ballot is concerned. The Duke of Richmond, who in 1788 propounded what was considered to be a shockingly revolutionary creed, including manhood suffrage, was discreetly silent about the ballot. Refined, high-bred, dainty English gentlemen used the ballot to preserve their personal honor and to protect their respective clubs, but it never

[1] State Tracts (London, 1693), pp. 443, 446.
[2] Cobbett's Parliamentary History, vol. 6, p. 889.

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occurred to them that any voter needed it outside, or that electors had opinions, feelings, and consciences.

The earliest recorded use of the ballot in connection with the English Parliament was its employment in the House itself, and it is passing strange that this fact was never used in later debates on the subject. There was a ballot for twenty-one members to constitute a select committee on the tenth naval report, April 30, 1805, though there are no details as to the manner of taking it.[1] February 5, 1817, there was a ballot for a committee of secrecy, and the manner of taking it is described. Lord Castlereagh moved the order of the day, and the speaker then desired the clerk to read over the names of the members in the order of their counties, and requested such members as had prepared lists of names of the committee to deliver them at the table. The clerk then read over the names, and members deposited their lists in the glass urn on the table. There was a second reading of names, and then a counting by a committee of inspection.[2] Committees to try election petitions were also elected by ballot in 1830.[3] Voting by a list prepared by each voter for himself was thus the earliest form of ballot in regular use; and in 1831 it found its way into a parliamentary statute, where it is described. This was the act for the better regulation of vestries and for the appointment of auditors of accounts in certain parishes of England and Wales, October 20, 1831. Section 15 runs:

> Provided always, and be it further enacted that any five ratepayers may then and there, in writing or otherwise, demand a poll, which shall be taken by ballot, each ratepayer delivering to the aforesaid inspector two folded papers, one of which shall contain the names of the persons for whom such parishioners may vote as fit and proper to be members of the vestry, and the other shall contain the names of the persons for whom such parishioners may vote as fit and proper to be auditors of accounts, provided always that each ratepayer shall have one vote and no more.[4]

The following section enacted that the inspector, without opening the papers, should deposit them in two sets of ballot-

[1] Parliamentary Debates, vol. 4, p. 511. [2] Parliamentary Debates, vol. 35, p. 219.
[3] Hansard's Debates, 3d Series, vol. 1, p. 632. [4] Statutes at Large, vol. 72, chap. 60.

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ing glasses or boxes, to be closed at the end of the poll, and that where the votes were equal, the inspector should decide by lot. It is worthy of note that this method of voting (by unofficial ballots) was the early American method also, against which Englishmen so vehemently protested, in complete ignorance of its English history.

Petitions to the House of Commons, praying for the ballot, from voters complaining that they were compelled to vote "at the will of their landlords," were being presented every session. Mr. Daniel O'Connell, the famous Irishman, made the first attempt to get this method of voting legalized by an instruction to the committee of 1830 on the East Retford bill — a measure to prevent bribery and corruption. He justified this tentative experiment by the need of experience and the natural dread of a sweeping measure. Eventually, he moved a new clause that at Retford the poll should be taken "by ballot in the way hereinafter mentioned." He and Hume were tellers for the division when 21 members voted for the clause and 179 against it.[1] There was some natural disappointment that Lord John Russell's reform bill of March 1, 1831, contained no promise of the ballot, though some accounts say that the ballot was in the original draft of the measure. The return of Mr. George Grote, the banker, for the city of London, gave a new impetus to the movement from its purely classical side, though it still had the support of Mr. James Mill and the philosophic writers of the *Westminster Review*, who pleaded for American liberty, whereby the people escaped the misery of having "institutions under which they suffer, fastened upon them for ages in spite of their inclination."[2] In his address, Mr. Grote had insisted upon the vote by ballot and triennial elections: "Without the ballot, free and conscientious voting is unattainable; without triennial elections, the purest system of voting will fail to ensure in the member chosen a steady feeling of accountability to the people."[3] Mr. Grote's maiden speech in the House was made in

[1] Hansard's Debates, N. S., vol. 22, p. 1354.
[2] *Westminster Review*, vol. 13, July, 1830.
[3] Personal Life, by Mrs. Grote, 1873, p. 71.

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advocating the ballot, in 1833, when it was defeated by 211 votes to 106. Henceforth he took charge of the measure, and what kind of censures he incurred may be gathered from what the *Times* said of him in 1837. He has, it remarked, "made himself the frontispiece of a revolutionary code. He has become the representative and the peculiar organ of whatever is most chimerical in theory, most reckless in experiment, most fatal and revolting in hostility to our national system." His speech of February 15, 1838, was reprinted, and a powerful deliverance it was, weighty in argument, and copious in illustration of landlord tyranny. "I wish it were possible," he said, "to lay before Parliament a return of the number of ejectments, notices to quit, changes of dealing, and dismissals from employment which have taken place as the result of the late elections."[1] The majority against Mr. Grote's motion was 117, but if he had carried it Lord John Russell would have resigned, and the ballot would have had a shorter history. It was to this speech of Grote's that Sydney Smith replied in a witty pamphlet.[2] He ridiculed him for preaching cowardice, for maintaining that the bold cannot be free, and for thinking the world a chess board. He did not believe that English landlords, "the men of woods, forests, and rivers," who had "the strength of the hills," were to be "baffled by bumpkins, thrusting a little pin into a little card in a little box." England was not to be governed by "political acupuncturation." An interesting account of the system suggested may also be quoted:

> In Mr. Grote's dagger-box, which has been carried round the country by eminent patriots, you stab the card of your favorite candidate with a dagger. I have seen another called the mouse-trap ballot-box, in which you poke your finger into the trap of the member you prefer, and are caught and detained till the trap-clerk below (who knows by means of a wire when you are caught) marks your vote, pulls the liberator and releases you.

Even Tom Moore could not resist the chaffing tendency, and his *Song of a Box* has the stanza:

[1] Reprint by Harper, p. 7.
[2] Ballot, by Sydney Smith, Longmans, 1839.

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And oh! when at last this greatest of Grotes
Must bend to the power that at every door knocks,
May he drop in the urn like his own silent votes,
And the tomb of his rest be a large ballot-box.

The more serious arguments against the ballot were, however, drawn from differently interpreted American facts and experiences. Lord Stanley said, in 1835, that he had been in America, and he confessed that what he observed in that country did not lead him to suppose that the ballot was an efficient protection against bribery, or proved satisfactory for the attainment of secrecy.[1] Mr. James Stuart had stated that canvassing had increased in America under the ballot, and "that it is quite as well known how every man votes in Baltimore or New York as in Liverpool or Edinburgh."[2] Mr. Tremenheere, referring to a Boston election, said:

I went to two of the polling places, to see the process. Persons were in attendance distributing printed lists of the candidates of the three competing parties. The voter took which list he pleased, put it into an envelope, and handed it to the persons sitting in a portion of the room parted off, who were appointed to receive it. I saw no attempt at concealment or mystery; the voting which I witnessed was as open as if no envelope had been used.[3]

The governor of New York, in 1850, said: "The alarming increase of bribery in our elections demands your serious attention . . . and I trust you will adopt such measures as shall effectually protect the ballot-box from all corrupting influences."[4] Mr. Grote noted that Maclane, the American minister here, "declares himself an enemy to the system." Old John Randolph, the American orator, was quoted by Sydney Smith, in his pamphlet, as saying of Virginia: "I scarcely believe we have such a politician in all Virginia as to mention even the vote by ballot, and I do not hesitate to say that the adoption of the ballot would make any nation a nation of scoundrels if it did not find them so." Dr. Crombie is reported as saying: "No person or any party in the United States speaks of the secrecy of the

[1] Quoted in *Edinburgh Review*, April, 1838.
[2] Three Years in North America, quoted in *Edinburgh Review*, January, 1853.
[3] *Edinburgh Review*, January, 1853. [4] *Ibid.*

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ballot; we hear of its secrecy only from persons in the old country."[1] A member of the Mississippi legislature assured Sir C. Lyell that "the repudiation of the state debt there would not have been carried in this country but for the facility afforded by secret voting"[2]—*i.e.*, in the legislature itself, which is quite another thing. Whether the ballot was believed in by American voters or not, there was still force in Mr. James Mill's contention: "It is evidence enough that they continue to use it. Why should they, unless they like it?" Sufficient was not known of American politics to check erroneous statements and inferences, and to explain that list-voting was not a necessary feature, that official papers could be used, and that absolute secrecy was attainable. Yet when new ground was broken in England it was on the list principle, which, as already suggested, had probably been copied in America from earlier English models. Sir Charles Dilke's amendment to schedule ii of the elementary education bill of 1870 raised the question of secret voting, and Mr. W. E. Forster accepted the principle, and proposed to limit it to London, as having had (under the vestry act of 1831, already referred to, which was embodied in Sir Benjamin Hall's act of 1855,) some experience of the ballot. Eventually, after some contention, it was settled that the London school board was to be elected by ballot, and that the ballots should be officially prepared. The same session saw a more ambitious attempt to deal with the whole question. February 14, Mr. Leatham moved for leave to introduce a ballot-bill, referring to the evidence of the select committee on the election of 1868 as showing a progressive softening of hostility to the method on the part of witnesses whose public utterances had committed them against it. There was no longer an appeal to American but to colonial experience. The method in vogue in Victoria, Australia, was the one Mr. Leatham proposed, with modifications, as the writing of the voter's number in an ink of chloride of cobalt, invisible at ordinary temperatures, but visible by raising the temperature 40 or 50 degrees, and the returning officer's initials on the ballot to

[1] *Quarterly Review*, April, 1838. [2] *Edinburgh Review*, October, 1853.

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prevent the Tasmanian dodge of false, *i.e.*, unofficial, ballot-papers. On the suggestion of Lord Hartington, the second reading was postponed, and when it came on the noble lord said he concurred in the paragraph of the committee's report respecting the ballot, and Mr. Gladstone remarked that he was now in favor of the ballot, though he had never opened his lips before on the subject, but had always voted against it. The paragraph of the committee's report referring to the ballot has great historical significance. It reads as follows:

Much evidence has been given by witnesses not exclusively confined to any political party to show that the discontinuance of open voting and the substitution for it of secret voting, or vote by ballot, would be of great advantage in parliamentary and municipal elections. We have endeavored to extend our inquiry beyond the arguments usually employed by the advocates and opponents of the ballot, and to ascertain how it was worked in the British colonies, and in foreign states where it has been adopted. With this view we have examined witnesses from Victoria, New South Wales, South Australia, Tasmania, and have also received evidence as to the system in use in France, Italy, and Greece. The effect of this evidence has been to prove that in these countries, under a system of ballot, the poll is taken without intimidation, riot, or disorder, while in Australia bribery and treating have been greatly reduced and personal canvassing discouraged. It remains to be considered whether the ballot should be adopted in this country. The principal objections which have been advanced against the ballot as applied to our elections are, that the act of voting is a public duty and should involve a public responsibility; that it would lead to hypocrisy and deception; that it would do little to restrain the practice of treating; that it would encourage bribery by making it more difficult to detect; that it would be wholly inoperative in the case of spiritual intimidation such as that which is allowed to exist so extensively in Ireland; that it would afford facilities for personation. While we admit that there is force in many of these objections, we are on the whole of opinion that the ballot possesses many great advantages, and that the weight of evidence leads to the conclusion that this change in the mode of voting would not only promote the tranquility both of municipal and parliamentary elections, but will also protect the voter from undue intimidation and introduce into elections a greater degree of freedom and purity than is secured under the present system. But, in recommending the adoption of the ballot, we desire to express our opinion that in order to secure the benefits we anticipate from its introduction into this

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country, the secrecy of the ballot should be inviolable, except in the case of any voter who is found guilty of bribery, or whose vote, in due course of law, has been adjudged invalid.[1]

A declaration so powerful, so impartial, so deliberate, would have made a crisis at any time; coming, as it did, when men were weary of corruption, eager for freedom, and ready for change, it made a revolution. An immense number of new voters had been enfranchised, an entirely new set of questions was under debate, and a good many old prejudices were slowly dying away. The direct result was the elections (parliamentary and municipal) bill of 1870, authorizing the ballot. It was read a second time April 3, 1871, without opposition. Mr. W. E. Forster had charge of it. Opponents now opened their batteries, practising all kinds of delaying and obstructive tactics, making long and irrelevant speeches, and moving adjournments of the debate and of the House continually. Mr. Gladstone's supporters met in council to consider how to defeat these tactics, and they resolved to withdraw their own amendments and leave the House when opponents got up to make long speeches. By these means, and the exercise of great patience, the bill was read a third time by August 8. Two days later the second reading was moved in the House of Lords. Lord Shaftesbury led the opposition, and the bill was rejected by 97 votes to 48. On the second day of the next session, Feb. 8, 1872, the bill was again read a second time in the Commons, and passed May 30. The Lords passed it through a second reading this time by 86 to 56 votes, and the measure became law.[2]

Polling under it extended from eight in the morning until four in the afternoon; but a subsequent act extended the hours of polling for the benefit of the working-classes from 4 A.M. to 8 P.M. in constituencies with over 2000 voters. Efforts were made to ascertain how persons voted, and thus defeat the secrecy of the ballot, by delivering party cards to the voters to give up at the booths, after voting, to agents of the candidates; but these efforts were confined wholly to one political party, and were soon abandoned.

[1] *Times*, March 17, 1870. [2] 35 and 36 Vict. cap. 33 (vol. vii, p. 193).

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The *Quarterly Review*, the organ of the intellectual Tories, said the bill had been passed "in deference, not to a genuine popular demand, but to a fading political tradition," and it predicted that elections would "come to be regarded as nuisances" whilst "voting may cease to be habitual."[1] But though the Lords, by a time limit to the act, provided for a change of opinion against the ballot, no such change has made its appearance. The ballot is now an English institution. It has been appropriated, incensed, and sanctified.

II. *Its Practical Working.*

Considering the ferocity of its assailants and the zeal they displayed in prophecy, it is very remarkable that the ballot has so generally and completely fitted itself into the British constitution. It has worked admirably. There is no wish for any change. The country squires do not suggest it. Large employers of labor never dream of it. Irish priests barely think of it. Yet these classes can no longer poll their men as they used to do, leading them up in procession, standing alongside the booths, and hearing them vote. Elections were never so orderly. The nomination is scarcely a perceptible event in its own centre or immediate neighborhood. The polling-day passes off quietly. No "states of the poll" can now be issued by political parties, at hourly intervals, (as used to be the case when votes were openly tendered,) to fan excitement and to indicate how contests are going. Except that conveyances (lent by friends of the candidates, as they cannot now be hired by the candidates themselves,) are rapidly moving about, bringing up voters, there is scarcely any bustle. The ballot itself is rapidly and quietly taken; and the voter is often surprised to note how quickly the votes are recorded and the voters pass away, whilst the exterior of a polling station is apparently so lifeless. Perhaps more organization may be required in looking after the voters, but one never hears an elector complain of the method, even if the less intelligent sometimes blunder in making their crosses or put too many upon the paper. The counting is officially made quite

[1] Vol. 133, p. 288, 283.

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as soon as it used to be under the old plan. It was upon this point Lord Denman made his protest after the bill was passed in the Lords. He objected to it amongst other things because, — so his protest of June 25, 1872, runs, — "after the balloting, the collection of the boxes and counting of papers would make a declaration of the poll a subject of suspense or delay for many days in large constituencies."[1] In compact constituencies, the poll is usually declared the same day, within three or four hours of its closing. Even in county constituencies, with polling stations several miles apart, this is often possible. But where the collection of the ballot-boxes is difficult, owing to want of railway communication, or where the expense of hiring another set of officials to count, over and above the officials engaged in receiving the vote, is considered undesirable, or when it is thought wise not to keep excited crowds hanging about until midnight, or, at the discretion of the returning officer for any other valid reason, the counting may be deferred until the next morning. The sealed ballot-boxes, in the meantime, are in the care of the returning officer at the counting station, which usually means the custody of the police. The counting begins in the morning, and the poll is declared about midday.

English political opponents never before invented so many dreadful things, to discover that not a single one of them was true, as in the case of the ballot. In orderliness alone, the gain has been worth anything sacrificed in the way of boldness and *viva voce* voting. The ballot, in fact, is business-like; the old plan was a pompous theatrical display. Poll books used to be issued after the old contests, showing how every elector voted. Hundreds of them are now in the British Museum, and instances are not unknown in which landlords have kept them to remember how their tenants voted, or shopkeepers have retained them as evidence of their personal fidelity to "the cause" espoused by most of their customers. As a part of the ballot reforms, the old open-air or hustings nomination, with its speech-making, was discontinued. A paper nomination took its place, and it has worked well. The ballot act provides that on a given num-

[1] Rogers' Protests of the House of Lords, vol. 3, p. 484.

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ber of days after receiving the writ of election, the returning officer (the mayor, or sheriff, or whoever he may be) shall sit for two hours to receive the nomination papers. Only one candidate can be nominated on one paper, and he must be described as to address, rank, and calling, so as to be identifiable. He has to be proposed by one voter and seconded by another, and eight registered electors have to sign the paper as assenting thereto. The returning officer supplies the form of nomination paper as fixed by the second schedule of the act; but the use of such a paper so supplied is not obligatory, though convenient and wise, since a technical objection, if successful, might invalidate a nomination. No instance of other than an official paper being used is on record. To avoid a danger of this kind, a candidate is nominated two or three times by different electors. The nomination paper does not indicate the politics of the candidate or of his proposers. The returning officer knows nothing of political parties; he has simply to deal with candidates identifiable, and with registered electors. He may be a partisan, but he cannot, if he wishes, be very unfair. There is no hindrance whatever to free and independent nomination. A clique of twenty with a candidate can nominate him on two distinct papers, without questions asked or hindrance of any kind. In parliamentary elections, it is not often that a "dark horse" is nominated at the last moment; but the practice is common in municipal contests, and then the two parties hold a conference and arrange withdrawals to save a contest in selected cases. It is a little surprising, now that large towns have been cut up into single member districts, that this general or non-party nomination has not been adopted. Organizations, it is seen, practically select candidates, but they cannot nominate them, whilst a candidate's social or professional description is all that the law permits to appear on the nomination paper. In municipal contests, cases have been known in which men of the same name, surname and Christian, have been nominated to confuse the voter and scatter the votes. The prescribed form includes addresses, and they are also printed on the ballot-papers, as will be seen further on. These

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regulations have not checked, but rather promoted freedom of nomination. A small party, making a moral protest, used in the hustings-days to be exposed to a good deal of chaff from the crowd. Under a paper system, nothing of the kind can occur. The check to reckless nominations comes into effect in another way. A candidate who goes to the poll, even if he polls but one vote, is compelled to contribute a part of the returning officer's expenses, discovered by dividing the sum total of the expenses by the number of the candidates. If necessary expenses were thrown upon the local rates, it is contended that reckless nominations might follow.

The returning officer provides the ballot-boxes, the ballot-papers, and arranges the numbers, sites, and officers of the polling stations. The polling stations are settled beforehand by the local authority, on two principles: a county elector is to have a station to poll at within four miles of his residence, and the minimum number of electors for any station is one hundred. Upon the number of stations in a populous centre depends the ease and rapidity of taking the ballot. An official statement is published, showing by register number of the electoral roll, or by districts or otherwise, at what polling station certain voters in certain streets, parishes, and townships are to vote. It is also customary for the candidates to send round cards, informing each voter that his number on the register is so and so, and his polling station at such a place. The card is taken by the voter, and agents ask for it as soon as he emerges from the polling place, convey it to the committee room, and mark off his name as having voted. "Your number, sir?" is the formula when no card is used. This is allowable, but the voter need not answer or use the card at all, or he may give the card to the opposite party agent. The register number of a voter changes with every annually revised register of electors, and the probability is that it is quite unknown to him. The returning officer also provides an official stamp for each polling station, copies of the register, and police to preserve order and regulate ingress and egress.

The taking of the poll is simple. All the stations open

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simultaneously at 8 A.M. A voter presents himself at the table where the presiding officer sits, attended by a clerk, and having before him a copy of the electoral register, ballot-books with counter-foils, and the ballot-box, which has previously been shown to be empty to the representatives of the candidates present, locked by the presiding officer, and sealed by him. On either side of the officer sit representatives of the candidates, selected for their knowledge of voters in the district, to check personation, one for each candidate, and each with a copy of the register before him. The voter gives or is asked for his name. It is found in the register, and a pencil line is drawn through it or under it. The officer then writes the register number of the elector on the counter-foil and stamps the ballot paper with the official mark, which is kept secret and has to be changed so that the same mark shall not be used again within less than seven years. The ballot paper and the counter-foil have a printed number upon them; the one on the back, the other on the face. The names of the candidates are arranged in alphabetical order. The following is a form: —

No. 1045		1	BROWN. (John Brown, of 52 George Street, Bristol, Merchant.)	
1230		2	JONES. (William Jones, of High Elms, Wilts, Esq.)	
		3	MERTON. (Hon. George Travis, commonly called Viscount Merton, of Swanworth, Bucks.)	
		4	SMITH. (Henry Smith, of 72 High Street, Bath, Attorney.)	

On receiving the paper, torn off at the perforated line, the voter takes it into one of the private compartments in the room,

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where there is a small desk and a pencil attached to a string. Here he marks his cross against the candidate or candidates for whom he wishes to vote. Folding up his paper so that the official stamp, which goes through, or maybe a mark on back and front, is visible at the back to the officer who is sitting near the box, he puts it in the slit of the ballot-box, by which a policeman stands, and his voting is over. The official paper and mark prevent the use of fraudulent papers, which are quite unknown, and heavy penalties are attached to the use of unofficial papers or to the conveyance of an official paper outside the booth. A paper inadvertently spoiled — say, torn by the pencil — must be taken for examination to the officer, who will, if satisfied of such inadvertence, supply the voter with another.

It is customary but not imperative to provide a distinct mode of egress from the station, as it facilitates voting. Special provision has been made for blind and illiterate voters. It may be better to quote (from the act) section 26 of schedule 1 entire, as it explains itself:

> The presiding officer, on the application of any voter who is incapacitated by blindness or other physical cause from voting in manner prescribed by this act, or (if the poll be taken on a Saturday) of any voter who declares that he is of the Jewish persuasion, and objects on religious grounds to vote in manner prescribed by this act, or of any voter who makes such a declaration as hereinafter mentioned that he is unable to read, shall, in the presence of the agents of the candidates, cause the vote of such voter to be marked on a ballot paper in manner directed by such voter, and the ballot paper to be placed in the ballot-box, and the name and number on the register of voters of every voter whose vote is marked in pursuance of this rule, and the reason why it is so marked, shall be entered on a list, in this act called "the list of votes marked by the presiding officer."

The declaration form (schedule 2) runs:

> I, A. B., of , being numbered on the register of voters for the county [or borough] of , do hereby declare that I am unable to read.
>
> A. B., his mark.
>
> [Date.]
>
> I, the undersigned, being the presiding officer for the polling station for the county [or borough] of , do hereby certify,

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that the above declaration, having been first read to the above-named A. B., was signed by him in my presence with his mark.

Signed, C. D.,

Presiding officer for

Taking such votes requires a few minutes extra, but no difficulties have been suggested. Blind men are as common in some districts as illiterates, and they are passed on to the care of the policeman at the door. Instead of their infirmity proving a hindrance to them, they are delighted to exercise the franchise. Illiterates are not quite so eager to vote, except during municipal contests; and when they have children attending board schools they have been known to practice reading and filling up, to escape that sense of inferiority they might otherwise feel. In the days of *viva voce* voting, illiterates were often bothered with an uncommon name, pronounced it incorrectly or vulgarly, an agent for the other candidate objected, and the vote was refused. Further, where there are only two or three names on a ballot paper, the position of the candidate for whom an illiterate wishes to vote can easily be made clear to a voter by his friends before he enters the booth. There can be no question that the ballot has been one of a series of steps in rendering a poll easier, quieter and quicker. Before the reform act of 1832, a voter had to establish his right to vote when he presented himself to vote. He might be an hour under examination before he could vote. The formation of a register, behind which the presiding officer cannot go, has cleared away all this business. The register is revised yearly; a barrister sits in court and rival parties make, amend, and contest claims. The parliamentary register is settled in the autumn, and comes into effect on the first day of January following. The municipal register, which includes women ratepayers, comes into effect November 1. In introducing his reform bill, Lord John Russell said he should provide machinery for taking elections in two days, but he added: "I hope the time may soon come when the machinery will be so simple that every vote may be given in a single day." That result had been accomplished before the ballot was made law, but when the poll closed at four in

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the afternoon a good many working-class electors were never able to vote at all. If they had some distance to walk or ride to work, they could not poll after eight in the morning, and they were not able to poll after four in the afternoon. With the present enlarged franchises, it would be scarcely possible to record more than five-sixths of the votes in a large constituency by four o'clock, and without the ballot not so many could be given in the present legal time between 8 and 8. The ballot has thus, indirectly, been an enfranchising measure. Not many working-men can vote in the morning, and there is usually a rush of them between twelve and one, and again between six and eight o'clock. It will some times happen that, at certain stations, some working-class voters will be in a block outside when the door is closed. But the solid fact remains that before the time when our large borough constituencies were divided into independent districts, each returning one member, twenty, thirty, forty, and even fifty thousand votes were easily taken in twelve hours. With proper facilities, in the form of abundant polling stations, there is no limit to the power of vote-recording under the ballot.

The counting can be readily accomplished in a few hours. Before they were cut up into separate constituencies, Liverpool, Glasgow, Manchester and Birmingham used to count their twenty to forty thousand votes by midnight. In taking a school-board ballot, under the system of cumulative voting, there is more delay, but everything depends on system in counting. With self-counting sheets, so ruled beforehand, counting is very quickly done. The plan in parliamentary ballots is partly prescribed. First, each box is opened at the counting centre in presence of the agents of the candidates and usually of the candidates themselves; its papers, face upwards, are counted and checked with the statement received from the presiding officers. Secondly, the papers from all the boxes are mixed together, face upwards. Thirdly, where there are two members to be returned, the single votes, or "plumpers," are, or may be, sorted out, and the cross-votes, as one Liberal and one Tory, are similarly served. Fourthly, the papers are

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counted into packages of one, two, three, four, or five hundred, and then the final statement is prepared. Doubtfully marked papers, or invalid papers having too many crosses or none at all, are usually sorted into special packages.

The provisions for secrecy are effective. Every officer, clerk or agent, before the opening of the poll, has to make a declaration of secrecy in the manner prescribed, and so of the person attending the counting. Six months' imprisonment, with or without hard labor, is the maximum penalty for an infraction of the law, on conviction, in such respect. The rule is to allow only one voter, or at the most two voters, in a polling station at the same time, and the counting always takes place in a room with locked doors. The ballot-boxes are sealed up, and so are the unused, spoilt, "tendered" ballot-papers, the registers used, and the lists marked by the presiding officer. Candidates' agents can add their seals to those of the presiding officer. The police convey the boxes and packages, in cabs, to the counting centre. After the counting, the papers, registers, lists, *etc.*, are sealed up in separate packets, and sent to the clerk of the crown in chancery, who retains them for one year, when, unless otherwise ordered, they are destroyed.

Unless a voter bungles strangely, how he votes cannot be discovered in the polling-booth, and cannot be traced in the counting. If it were so traced, it is an offence to make the fact known. The voter himself can say what he pleases about his vote, but no one concerned in the act of its record can speak about it. In the event of a scrutiny, under petition, there are special regulations for limiting the information disclosed. Amongst the ignorant, however, especially in the rural districts, partisans cleverly suggest doubts as to secrecy, and they still linger in some minds, but without any warrant.

It is admitted that the English system is simple, protected from fraud, and absolutely successful. There is positively no record of attempts to defeat its secrecy or to organize fraud, and if they were made they would be instantly discovered and punished. It was worth waiting a little longer to attain this degree of perfection, and to have a reform buttressed by public

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opinion. Clever tacticians sometimes make an effort to anticipate a ballot, and to obtain declarations a voter may consider binding. A form is sent round to the electors, by post, with a stamped envelope for its return to the agent of a candidate or the chairman of his committee, in which the voter is made to say, "I intend (or promise) to vote for" so and so. The plan originated with the territorial party, and it is hardly a fair one. It is usually put into operation early in a contest, sometimes when there is as yet only one candidate in the field. But it can be easily met by a voter's declining to return the form, which he is not bound to do. Probably 40 per cent of the forms are detained or destroyed. The plan is costly, and the last corrupt practices act, by imposing a limit on expenditure, has greatly reduced its significance and use. It was never more than a lawyer's dodge.

The effect of the ballot upon corruption has been very great. Treating and direct bribery were at once diminished by it. It is useless to corrupt unless its effects can be clearly traced; and spending money to purchase votes is simply waste when a voter, demoralized enough to take money, can still vote as he pleases without being found out. The act of 1883, limiting agents and messengers, reducing expenditure, and more severely punishing bribery, treating, and other forms of corruption, as well as bringing in acts done a month before an election, has signally helped the ballot to purify our political contests. In some respects, the rich candidate has still advantages: he can subscribe more freely to local institutions; he can spend more money in supporting local political organizations; and he is likely to have more friends who will lend him carriages on the day of polling. Two reforms are needed, however, to make the ballot absolutely perfect, — house to house canvassing should be prohibited, and landlords' agents, stewards, bailiffs, and factors should be prohibited from taking part in an election, or looking after the conveyance of voters to the poll. There could be no objection to a proviso permitting such action where the landlord himself was a candidate, inasmuch as it is against wealthy class combination that protection is needed, and individual freedom should be as little fettered as possible.

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The general moral effect of the ballot has been good. It was designed to protect conscientiousness, and it has developed it. It has broken the terrible continuity of feudal traditions. It has given political virility to the individual voter and the undemonstrative politician. The barrier of law has been erected against undue influence, let it come whence it may — from the landlord, the employer, the priest, or the executive government. To restore, through social associations, what they had lost politically, has been the aim of the aristocratic party ever since, by forming working-men's associations, directed by ennobled patrons, and by "Primrose Leagues," officered by titled ladies and conferring cheap distinctions. Free voting has been followed by general voting. Abstentions are less and not more common. But it deserves mention that we have had striking oscillations of opinions, under the ballot, at our general elections. The changes from 1873 to 1874, and from 1879 to 1880, and from 1885 to 1886 are often attributed to other things, as democratic uncertainty and impatience, when it would be more correct to say that opinions in course of quiet formation in two of the instances given, and some natural doubt in the third, were suddenly flashed on the screen by the light of secret voting. Statesmen must study more carefully the signs of popular feeling when they have to govern under a ballot-system than when there is open voting; and this is rather an advantage than otherwise in any country. Moreover, the dominance of a metropolis, so much to be feared in countries with a wide suffrage and a developed newspaper press, can be only temporary where the ballot encourages political resistance.

The English form of ballot readily admits of adjustment to the American political system. It has served England in the school-board election, where the elector has to distribute an uneven number of votes amongst several names upon one and the same ballot-paper. It worked well under the "three-cornered" system and the restricted vote. In each case polls were taken in a single day and with ease and quietude. In many instances there were no difficulties in counting and declaring

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the result on the same day. The ballot can, in fact, be as readily used for the election of several members as for a single member election. Under the new system of local government about to be introduced in this country, it may be thought desirable to elect several distinct representatives on the same ballot-papers and at the same time, in which case an approximation will be made to the American plan. Senator Wyman, of Cambridge, Massachusetts, has been good enough to make me acquainted with the ballot-project of April 8, 1888, and I have before me a specimen ballot-paper, in two columns, containing thirty-two names, with a corner for a popular vote on the license question. It would be a simpler duty to fill up this ballot than to vote for six candidates out of twenty for thirteen seats on a school board when the elector had exactly thirteen votes to give. The number of officers to elect, and the consequent size of the ballot-paper, cannot materially affect the ease and rapidity of voting amongst fairly educated electors. The paper might be doubled in size without real inconvenience. It would take more time to fill, and more time to count; it might also necessitate better mechanical means in registering numbers and in preventing the use of fraudulently imitated papers; but a numbered counter-foil could still be used, the plan of marking a register number on the face of the counter-foil could be adopted, and provision made for a scrutiny, if considered desirable. An increase of polling stations would much facilitate the rapid taking of a large number of votes in state elections, and the counting is of minor importance, though it could be readily finished on the day following a poll. The Massachusetts ballot-paper indicates the party designation of the respective candidates. There can be no objection to this plan. It is very helpful where there are so many officials to be elected and so many candidates. But it seems desirable to state more distinctly the addresses, so as to avoid any confusion that might be caused if candidates of the same name, Christian and surname, were nominated in order to confuse the voter. The addition of an instruction along the side of the vote-squares, as "Vote for one," "Vote for two," is novel and useful. Instructions are

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officially placarded in England, and usually sent direct to the voter by the candidates on the cards already mentioned. Where there are so many votes to be recorded, the voter should be in no uncertainty as to how many votes he can give in each case. The nomination of candidates individually may not be possible in America, but it has answered very well with us, and it might be adopted, with the addition to the ballot paper of his party designation, in order to guide the voter. In other ways it would be possible to appropriate points in the English system that have stood the test of experience and given our electors a confidence in the fairness and absolute secrecy of the ballot which has preserved it from reactionary reformers, always on the watch for opportunities to restore corrupt influences and revive extinguished power.

The complete or even partial adoption of the English method would be a great historical compliment, if it could hardly be considered a vindication. The time has gone by, with us, when anything American is necessarily to be condemned. We should be delighted to find a similar improvement as to anything politically English in the United States. The cause of pure and enlightened democracy has to be championed and carried forward by the great English-speaking nations.

EDWIN GOADBY.

III. *Its Legal Incidents.*

The machinery of secret voting introduced by the ballot act has necessarily involved some change in the legal incidents of a contested election. At common law, the returning officer was treated for many purposes as holding an office of a judicial or quasi-judicial character. He was sworn to make a return of that candidate who in his judgment had a majority of legal votes, and was therefore entitled and bound to consider and determine the qualifications of voters. It follows that an action would not lie against a returning officer for improperly rejecting a vote, unless it was alleged and proved[1] that the refusal was wilful (*i.e.*, perverse) and malicious.

[1] As in the leading case of Ashby *vs.* White.

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Under the ballot act the judicial functions of the returning officer have been reduced to a minimum. He is required to decide upon the validity of objections raised to the written nomination papers of the candidates. But it would seem from a recent decision of the House of Lords[1] that his duty in this respect is confined to disposing of "formal objections arising upon the face of the paper, and making inquiry as to whether the nominators are registered electors, and whether the paper is in statutory shape." He cannot, therefore, go behind the paper and consider extraneous objections to the legal eligibility of the candidate, on the ground, *e.g.*, that he holds an office which disqualifies him from being elected.

As regards the holding of the poll, it is the business of the returning officer to provide proper polling-stations, ballot-boxes and papers, stamping instruments, copies of the register, *etc.*, and to appoint a presiding officer and a sufficient number of clerks for each polling-station. The Hackney election in 1874 was declared void, because, through the failure of the returning officer to supply the necessary boxes and other materials, no poll could be taken at two of the appointed polling-places, and out of a constituency of 41,000 electors 5000 were thereby prevented from recording their votes. It was not necessary in this case to determine whether the returning officer (who had acted *bona fide* and with reasonable care) had come under any legal liability either to the candidates or to the voters; but as his duty to provide properly equipped polling-stations is obviously ministerial, it appears clear that he could be sued for a breach of it (without proof of malice or negligence) by any person who could show himself to have been aggrieved.

The process of taking the votes, which consists in delivering to each elector a properly stamped ballot paper, entering upon the counter-foil his number in the register, and placing a mark in the register against that number, falls within the province of the presiding officer. These are ministerial duties, and it was decided by the Court of Common Pleas,[2] in 1873, that an action would lie against a presiding officer, who had delivered to cer-

[1] Pritchard *vs.* Mayor of Bangor. [2] In the case of Pickering *vs.* James.

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tain electors ballot papers, not bearing the official stamp, which by reason of this defect had been held invalid on a subsequent scrutiny.

Neither the returning nor the presiding officer has any jurisdiction to inquire into the qualifications of a person who tenders a vote at a polling-station. The only questions which may be put to the voter are as to his identity with the person entered on the register, and as to whether he has already voted. His answers to these questions are, for the purposes of the day, conclusive, and the officer may not inquire into their truth or falsehood. If, however, another person has already voted in the same name, the later applicant receives a specially colored ballot paper, which is not put in the box, but set aside in a separate packet (of "tendered votes"), and not counted in the enumeration of the poll. The offence of personation (previously a statutory misdemeanor) is made by the ballot act a felony, and is extended so as to include the act of applying for a ballot paper in the name of another person, real or fictitious, or after having already voted at the election. To forge or counterfeit a ballot paper or the official mark; fraudulently to put into the box any paper other than a ballot paper, or to take a ballot paper out of the polling-station; to destroy or open or otherwise interfere with a ballot-box or packet of ballot papers — are misdemeanors. To endeavor to obtain in a polling-station information as to how a person has voted, or to communicate information so obtained, is an offence summarily punishable with six months' imprisonment.

In counting the votes at the close of the poll, a judicial duty of great delicacy and importance is committed to the returning officer. He, and he alone, has to determine (subject, of course, to his decision being reviewed by an election court in the event of a petition against the return) "any question arising in respect of any ballot paper." In every election conducted by ballot there is a number of instances of papers marked in such a manner as not to conform with the directions of the act. Experience shows that there are a hundred ways in which ignorance, perversity or fraud may misunderstand or seek to evade the

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simple requirements of the law. It would be profitless to discuss the numerous cases, each turning upon its own facts, in which election courts have had to consider the correctness of the returning officer's decision in accepting or rejecting papers inartificially or illegally marked. The result of the authorities may be shortly stated to be that the provisions of the act, as to form, are directory only; that a substantial (as distinguished from a literal) compliance with them is all that the law requires; and therefore that any paper, however informal, which unambiguously indicates the intention of the elector to vote for a particular candidate, and which does not (by written words or signs) give any clue to the identity of the voter himself, is valid and ought to be counted by the returning officer.

The arithmetical process of counting the number given to each candidate of the papers which the returning officer has decided to be valid is plainly a ministerial function. It is also, however, a matter in which mistakes of great consequence may easily be made, and it has accordingly been held that a petition for a recount will lie. In the Ashton-under-Lyne case, early in 1886, upon such a petition, Mr. Justice Denman, one of the election judges, ordered the ballot papers to be brought up to London to the royal courts of justice, and himself recounted them in the presence of counsel for the petitioner and for the sitting member.

After the count, the returning officer is "forthwith" to declare elected "the candidates or candidate to whom the majority of votes has been given." He has no power to make any other declaration than such as is warranted by a correct enumeration of the papers. In the Bangor case, already referred to, the returning officer was advised that the candidate who had received a majority of votes was disqualified, and that, his disqualification being known to the electors, the votes given to him were thrown away. He accordingly published a placard in which, after stating the number of votes polled for each candidate and the effect of the advice so given to him, he purported to declare elected the candidate who had received the lesser number of votes. The law lords were unanimously of opinion

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that this announcement must be treated as a declaration that the candidate shown by the numbers stated to be in a majority had been elected, and that the rest of it, including the assumed declaration in favor of the other candidate, was *ultra vires* and wholly nugatory.

The person declared to be elected fills the seat, and can (in general) be ousted only by an election petition presented to the High Court of Justice and tried by two election judges. Where the petition alleges, as its ground, a breach by the returning officer of any of the duties cast upon him by the ballot act, it will not be successful unless the petitioner can show either (*a*) an improper acceptance or rejection of a sufficient number of ballot papers to alter the result, or (*b*) mistakes in the enumeration of valid papers such as (when set right) to get rid of the apparent and declared majority, or (*c*) such general irregularities in the conduct of the election as to show a substantial departure from the system of voting prescribed by the act. The first case (in which the petitioner asks for a "scrutiny") is the least uncommon of the three; and it is obvious that, as the inquiry turns altogether upon whether the papers received or rejected are or are not good upon the face of them, the identity of the voter need not be disclosed, and the secrecy of the ballot is not in danger. In the other two cases, from the nature of the issue, no question can arise as to how particular electors have voted.

It may, indeed, be stated with substantial accuracy that the only case in which, under our system, the ballot-box can be forced to yield up its secrets, is upon a scrutiny, in which votes are sought to be struck off on the ground of personal disqualification in the votes, *e.g.*, through bribery or personation. Where a candidate or his agent is proved to have corrupted a person who voted, the ballot paper of the voter is not looked at, but a vote is struck off the poll of that candidate. Where an elector has voted corruptly, but no complicity on the part of a candidate or his agent can be shown, the counter-foil is looked to, and the ballot paper having by its means been traced, the vote actually given by the delinquent is struck off the poll of whichever can-

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didate received it. The disqualification must be first proved before the ballot paper can be examined.

It may be added that during the fifteen years that the ballot has been in force in the United Kingdom the legal controversies to which it has given rise have been surprisingly few, and the number of cases in which it has been necessary or possible to inquire in public how particular individuals have voted is quite insignificant.

H. H. Asquith.

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REVIEWS.

Gouverneur Morris. By THEODORE ROOSEVELT. American Statesmen Series. Houghton, Mifflin & Co., Boston and New York, 1888. — 370 pp.

Martin Van Buren. By EDWARD M. SHEPARD. American Statesmen Series. Houghton, Mifflin & Co., Boston and New York, 1888. — 404 pp.

Gouverneur Morris represented much that was best in the revolutionary era, and his life is well worthy of a place in this series. Wealth and social position opened for him the way to a political career. He belonged to one of those great families which from early colonial times had controlled the politics of New York and given to them a peculiar aristocratic character. In order to join the revolutionary party, Morris was forced to break many of the ties of family and friendship. Some of his nearest relatives cast in their lot with the Tory party of the state. The account given by Mr. Roosevelt leads us to infer that Morris hesitated for a time. His tastes and surroundings inclined him toward aristocracy. He was not an admirer of democracy; was in no sense a demagogue; did not believe in the inherent wisdom of the masses. He had no sympathy with the doctrine of natural rights, which was adopted by so many of the revolutionary leaders. Practical considerations, then, rather than theories of government; the conviction, gradually formed, that independence had come by the natural process of development to be a necessity, led Morris to decide in favor of revolt. He and John Jay acted in the matter strictly like Anglo-Saxons, and not at all like Frenchmen. Had all our public men at the time acted in the same way and from the same motives, the sweeping statements usually made in the histories about the good sense shown throughout the movement would be true. But unfortunately they are an exaggeration.

The most valuable service rendered by Morris to his state after the outbreak of the revolution was in the convention which drew up the constitution of 1777. It is to his credit that he opposed the provisions for the establishment both of the council of appointment and the council of revision. But they were adopted, and in connection with the former the "spoils system" was introduced into New York politics. In the Continental Congress, during 1778 and 1779, Morris uniformly supported the plans and efforts of Washington, and opposed the particularistic policy

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advocated by Samuel Adams. In the last years of the war he devoted himself to the study of the finances, and urged the adoption of an adequate system of taxation, instead of the continued resort to paper money. The essays which he published on the subject won for him from Robert Morris an appointment as Assistant Financier. While in this office he made public a plan for the issue of decimal coinage, which, when modified by Jefferson, became the basis of our present monetary system.

When the revolutionary struggle was successfully ended, Morris was among the first to see the need of national union. His strong will and ardent temperament, his love for direct, straightforward methods, his knowledge of the difficulties which Washington had been forced to contend with, and above all his practical experience in the department of finance, where centred all the elements of weakness, taught him that the confederation must soon pass away. But he did not for a moment believe that the states would separate; he saw that they were bound to unite. "If persuasion would not unite the country, then the sword would." He was a leader in that small band of men within the Convention of 1787 who came there to represent, not a state, but the country. While many of the revolutionary leaders in their excessive love for local and individual freedom seem to have forgotten entirely the prospect of national unity which dawned upon them in 1776, Morris was ready to go to the other extreme. The flight of his thought was wholly above and beyond state lines. He was ready for the sake of unity to see them almost obliterated. He believed that "state attachments and state importance had been the bane of the country." Not only did he advocate proportional representation in both houses of Congress, but that that body should be empowered to repeal any state statute and legislate directly in all cases of conflict between state laws. He favored a strong national executive and judiciary. Barring two or three erratic notions, like his jealousy of the West, and also a certain excessive tendency toward centralization, not justified by later events, every student of the *Madison Papers* must confess that the services of Gouverneur Morris in the Constitutional Convention were second to none, except those of Madison.

With the adoption of the constitution the most important part of Morris's career ended. With his work as an observer and critic of the French revolution, able and just though it was, we are not concerned. In 1799 he returned to America and the year following was elected to the United States Senate. During his term of service there, and throughout the rest of his life, he naturally acted with the Federalist party. He however supported Jefferson in the purchase of Louisiana. But when embargo and war with England were resorted to by the dominant party, Morris sympathized fully with the extreme New England

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Federalists in their plans of secession, and with them incurred the suspicion of treasonable intent.

Thus we have in Morris a typical Federalist of the early period of our history. His views in their sources and character were the views of his party. His life kept pace with its development and closed at the time when the party collapsed. Mr. Roosevelt has related the history of his career in a plain direct manner, and was evidently in sympathy with his subject.

Van Buren was a man quite different from Morris, and his life is written from a different standpoint. Mr. Shepard's is one of the most scholarly productions which has appeared in the series. He has been diligent in the collection of material and clear in the construction of his argument. For his book, though a biography, is an argument from beginning to end. Unlike the preceding volumes of the series, it is written with a Democratic bias, and is an attempt to rescue Van Buren's character and reputation from the charges which have been made against them. Hammond accused him of being non-committal. Von Holst[1] has called him the "first politician-president," and described him as a man whose talents did not rise to the rank of statesmanship, who possessed much experience and skill in political intrigue, and who was governed in action by motives of expediency rather than by principle. "The propelling forces in him were never moral powers which he served for their own sake." "From the very first to the last, he remained in that characterless middle, in the shallow stagnant water of trading politics." To the German historian he is simply the first of American wirepullers, whose fortunes on the stage of national politics were made by Andrew Jackson. Mr. Shepard's object is to show that this view is erroneous, that it is not supported by the facts of history or the utterances of Van Buren himself; in short, that it is worthy only of a place in John Quincy Adams' *Diary*.

Mr. Shepard claims, in the first place, that the influence of Jefferson over the mind of Van Buren was very strong from the outset. In the Democratic school he received his training, and from it he never departed. He became, in fact, the second great expounder of its doctrines. Instead of being non-committal, he is shown to have declared his political faith with sufficient boldness and consistency on all important occasions. Mr. Shepard even goes so far as to maintain that Van Buren formulated the doctrines which Jackson defended before the country, and so is to be regarded as the founder of the Democratic party in its modern form. If this be true, what is usually regarded as the authoritative view of our political history between 1820 and 1840

[1] Verfassung und Demokratie, II, 142 ff.

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must be abandoned or seriously modified. The standpoint of Benton must be chosen as the correct one rather than that occupied by the statesmen who organized the Whig party.

Mr. Shepard shows how Van Buren received his training and passed through the earlier stages of his political career amid the party conflicts of New York. He led the Bucktails in a long series of struggles with the Clintonians, when the only question at issue was the possession of the offices. He adopted fully the political methods of the time and place, and became very skilful as a party leader. The doctrine of strict party allegiance and the employment of sharp campaign tactics he carried with him into national politics. Mr. Shepard does not attempt to defend him against the charge of heavy responsibility for the adoption of the "spoils system" during Jackson's administration, but claims that he should not be judged by standards which have been adopted since his time. The sufficient answer to this would seem to be that outside of New York the standard of public action as to removals and appointments had already been set as high as it has ever been since. The proof of this is to be found in the utterances and practices of the earlier Presidents. Why should John Quincy Adams live up to one standard, which all must agree to have been the only true one, and Van Buren be judged by one very much lower? Van Buren seems to have deliberately chosen the lower, the unstatesmanlike course of policy in this matter.

Mr. Shepard argues further, that with the accession of J. Q. Adams to the presidency an elaborate attempt was made by him and Clay to enlarge the functions of the national government, and that to a dangerous extent. This called for a reassertion of true democratic doctrine, and Van Buren from his seat in the Senate became its leading advocate. He also used the skill he had acquired in New York for the organization of a new party of opposition. He then, with Jackson, led in this second revival of democracy, as Jefferson had done in the first. This again is essentially Benton's view, though Jackson, not Van Buren, is his hero.

It is claimed by the author that between 1824 and 1828 Van Buren opposed Adams's schemes of internal improvements and of the Panama mission from high political considerations, as likely to lead to dangerous governmental encroachment and corruption. At the same time, like an able tactician, he was making all possible use of the alleged "bargain" between Adams and Clay, and was laboring to convince the people that their will had been wrongfully thwarted thereby. He spread and enforced by all means in his power the dogma of absolute majority rule, and a careful limitation of the sphere of government. Mr. Shepard believes that the issues involved in the election of 1828 were very grave

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ones. Had Adams been re-elected, he considers it probable that the government would have become involved in a complicated system of internal improvements which would have seriously changed its character.

The election of Jackson introduced Van Buren into the race for the presidency. The breach between the President and Calhoun removed his only formidable rival within the Democratic party. The arbitrary rejection by the Senate of his appointment as minister to England helped him into the vice-presidency in 1832. Though at first opposed to the removal of the deposits from the United States Bank, he quickly yielded to the arguments of Kendall and fell into line with the other supporters of the President in his crusade against that institution. During his candidacy in 1836 he skilfully avoided a break with the slave power by declaring himself opposed to the abolition of slavery in the District of Columbia.

Van Buren appears to the best advantage when, in the first year of his presidency, the country was overtaken by the crisis of 1837. He then bore with his customary patience the abuse that was heaped upon him, and manfully refused to yield to the demands for government aid. He had gained much through his connection with Jackson, but then he had to bear the results of the ex-President's errors. That the crisis of 1837 was to a considerable extent promoted by the financial experiments of Jackson's last administration cannot be doubted. Its chief political effect was the defeat of Van Buren in 1840, and the temporary establishment of the Whigs in power.

Once again, in 1844, Van Buren showed by his letter in opposition to the annexation of Texas that he was capable of subordinating personal advantage to principle. Through this he lost a second presidential term. But, after all, the rank which one assigns to Van Buren and those associated with him among our public men must depend upon his opinion of the issues involved in the elections of 1824 and 1828. Did J. Q. Adams propose anything new even in the councils of the Democratic party? An examination of the utterances of Jefferson, Madison, Monroe, Calhoun, will, I think, show that he did not. If that is true, the opposition to him was factious and based on motives to which the true statesman will never descend. A flood of light is thrown on the events of the time by the history of Jackson's struggle with the Bank previous to 1832. That, however, Mr. Shepard ignores. This book contains the best statement of the Democratic side of the question yet made, but it still remains true that the Democratic leaders in the time of Jackson were chiefly distinguished for skill in the arts of partisanship. Van Buren was simply the most respectable among them.

H. L. OSGOOD.

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The Present Condition of Economic Science, and the Demand for a Radical Change in its Methods and Aims. By EDWARD CLARK LUNT, A.M. New York and London, G. P. Putnam's Sons, 1888. — 8vo, xii, 114 pp.

In the book before us we have a good example of the curious confusion which is now prevalent among economic writers. The author comes forward as an adherent of the orthodox school and an expounder of deductive doctrines. As to the first claim there can be no doubt; at least he shows a tendency towards that intolerance which has made the word "orthodox" so obnoxious to the new school of economists. The other claim cannot be conceded. A writer can hardly be a capable champion of deductive methods who makes so great use of a low type of inductive reasoning. He strings together a few unfortunate remarks of certain adherents of the historical school, — historical as well as orthodox economists have made unfortunate remarks, — along with many wise sayings of other writers whose meaning he evidently does not clearly understand, and thus brings out the inconsistencies and weakness of the historical school. This is a very easy method and one that has often been applied to a multitude of subjects with the same success. The only thing remarkable is that the user of this method should regard himself as a deductive thinker, and capable of discussing the different economic methods of reasoning. He makes, in an opposite direction, the same mistake that a few of the historical school make, who suppose that they use inductive reasoning. A writer's own opinion cannot always be taken as to the method he uses. Economic method is a department of logic, and many capable economists have not given that attention to logical studies which would entitle their opinion to much weight in the discussion of methods. So many name their method merely from the standpoint of their education, feelings or nationality that no valid judgment can be obtained of their real method until their writings and premises are carefully examined.

This fact accounts for a large part of the confusion in economic discussions, and is especially prominent in the controversy about the functions of the state which forms the vital issue between the two schools. No one doubts that the economic man of Ricardo is a deductive concept. It is the man we see, stripped of many of his vital attributes. But is the concept of the state, so much used by the historical school, any less deductive? It is not the state which acts at Washington or even the one at Berlin. It is merely the industrial functions which a state may exercise, thought of apart from the many other functions which actual states exercise, and used as the basis of further reasoning. So, too, the church, as an economic category, is

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not the church of history, but only those functions of it which exercise an influence on the economic life of the people. Both of these are really deductive concepts, formed exactly as Ricardo formed his economic man. It is not remarkable that there should be controversy about induction and deduction. Such controversies have existed through the ages and are likely to continue for many more. It is, however, peculiar that so many of both schools should create and defend deductive concepts of one class and at the same time deny the right of their opponents to make similar concepts of another class. Many of the writers who have an abhorrence for the economic man show, in their writings, a clear concept of the economic state and church, and make use of good reasoning from these premises. On the other hand, the champions of the economic man cannot invent phrases enough to express their dislike of the economic state, and, by a strange peculiarity in their mode of thought, think they are doing deductive reasoning a service by so dragging the concept of a state through the mire of the ages that no one can think of it except as clouded by its worst historical associations. Surely no one, for example, has a clearer concept of an economic man than Professor Simon Newcomb, yet it seems impossible for him to think of the state without its bringing into his mind a vision of the government at Washington and its many alleged delinquencies. What is his opinion that "no really wise economic legislation by Congress is attainable" other than a use of that crude inductive method the use of which, concerning the economic man, he would regard as absurd? Our author, too, has little sympathy for those who go on piling up historical material for many years before attempting to give this material scientific form; yet the only method he has discovered for obtaining a concept of the state is by "wading through the fallacy-reeking pages of the *Congressional Record*." [1]

In one place the author presents a sample argument and then asks, where is the error in this process of reasoning? As it affords an excellent opportunity to show the vital differences between the two schools, it will not be out of place to discuss it. Considering a proposed change in the working day from ten to eight hours, he says:

> The workman will produce less in eight hours than in ten, — probably not so much as a fifth less, but certainly somewhat less; the average share of each consumer will be smaller; the aggregate wealth of the country will increase less rapidly and capital will grow more slowly. Economics says this, and steps aside in favor of ethics.[2]

By saying that capital will grow more slowly, the author doubtless means that, as the industry would be less productive, the rate of interest

[1] Page 111. [2] Page 89.

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would be lower, and with a lower rate of interest less capital would be accumulated. I will accept the conclusion that the rate of interest will be lowered, but must join issue as to the slower growth of capital. The author concedes that the proposed change will develop the moral nature, and if this be true it will affect the accumulation of capital. The rate of interest is largely determined by the esteem in which the future is held. The development of the moral nature greatly increases the regard for future welfare, and thus increases the amount of capital which will be accumulated at a given rate of interest. The effect of the lower rate of interest would therefore be counteracted by the greater esteem in which the future is held, and the growth of capital would be as large as before.

In the same way the argument for the decrease in the efficiency of labor is defective. The workman will produce less in eight hours, yet the added leisure will develop in him a taste for new pleasures and change in a measure his demand for commodities. If his intellectual and spiritual nature is developed, as our author concedes, those lower forms of consumption, such as liquor and tobacco, will be consumed less largely, and other articles which allow a better use of land will be substituted in their places. Suppose, for example, they are coffee and sugar. A demand for liquor and tobacco increases the use of a class of land for which the demand is already so great as to cause a high cost of production. Labor upon them is inefficient, to use Ricardian phraseology, because the margin of cultivation is so low. So little use, however, has been made of lands fitted for coffee and sugar that only the best lands are in use, and hence labor is upon them very efficient. The change from liquor and tobacco to coffee and sugar would increase the efficiency of agricultural labor and thus counteract the decrease in efficiency which the reduction of hours had made in the production of commodities

These are only specific examples. They are used to illustrate that change in the demand for commodities which accompanies the development of intellectual and moral powers, and which increases the efficiency of labor by reducing the demand for land. With the higher civilization of man comes a greater desire for less exclusive commodities, the demand for which allows a better adjustment of man to nature and thus increases the efficiency to labor.

All our readers may not accept these conclusions, yet I hope they will at least see the correctness of that point of view on which they are based. A reduction in the hours of labor elevates the moral nature. The elevated moral nature increases the estimate of future welfare, and through this change a lower rate of interest causes capital to grow as rapidly as it did before with a higher rate. The orthodox economist,

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by excluding moral premises, stops at a mere temporary effect, while the historical economist seeks to discover the ultimate effect by carefully considering every premise which modified the production or distribution of wealth. Premises from morals have great weight in his mind because he realizes their importance as the real source from which so many economic motives spring.

The author characterizes the new economists as a school of politicians rather than a school of economists[1] because they reject the maxim of *laisser faire*. Were the ideas of the new school concerning the state like those of their opponents, so empirical that they could not think of the state without seeing Washington or Berlin, this charge might have some basis. The real problem, however, is not what effect political action in industrial matters will have upon the American or German people, but what effect the assumption of certain industrial functions by the state will have upon the production, distribution and consumption of wealth. The first is a political, the second is an economic problem. They differ just as much as do the questions: What effect will competition have upon an economic man, and what effect will it have upon a Hindoo or an Arab?

It may be pertinent to ask, in closing, whether the doctrine that "state control is directly opposed to individuality and tends to repress spontaneity of character"[2] is an economic axiom, and whether it is inductive or deductive. Perhaps if our author will consider these questions carefully he will see more clearly who are the school of politicians, and who they are who subordinate economic doctrine to crude empirical generalizations derived from other sources. The effect of his political education may be seen from his closing exhortation:

> When the self-government of the states shall have been so far lost as that of the departments of France, or even so far as that of the departments of England, on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will have been wrecked forever.[3]

What are these ideas but a remnant of those primitive notions as to the functions of the state which arose out of the peculiar surroundings of our ancestors? The American people are adjusting their political ideas to their economic and social environment, and are beginning to see more clearly that a reasonable activity on the part of the state is not detrimental to the harmonious development of each individual.

SIMON N. PATTEN.

[1] Page 97. [2] Page 99. [3] Page 101.

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Taxation in American States and Cities. By RICHARD T. ELY, Ph.D., assisted by JOHN H. FINLEY, A.B. New York, T. Y. Crowell & Co., 1888. — 8vo, xx, 544 pp.

Some months ago the Maryland tax commission issued its report, to which was appended a supplementary report by Professor Ely. This supplementary report is now published in a revised form, with considerable additions; but as the new matter consists, with the exception of a few preliminary general remarks, mainly of historical and statistical information, and as the report itself was reviewed in the June number of the POLITICAL SCIENCE QUARTERLY (vol. iii, pp. 371–373), there is little occasion for extended criticism of the present volume. Part IV, however, is worthy of mention as containing some exceedingly convenient tables compiled from various sources, and relating to constitutional provisions, state and municipal revenue, expenditure, indebtedness, *etc.*

Dr. Ely's definition of taxes does not seem very felicitous:

> Taxes are simply one-sided transfers of economic goods or services demanded of the citizens, and occasionally of those not citizens, but who, nevertheless, are within the reach of the taxing power, by the constituted authorities of the land, for meeting the expenses of government, or for some other purpose, with the intention that a common burden shall be maintained by common contributions or sacrifices.

This definition is neither concise nor precise. The word "individuals" would express the same idea as "citizens and occasionally those not citizens," *etc.;* but in neither form would the definition include corporations and other juristic persons. Again it is difficult to see the reason for attempting to define the purpose of taxation, when it is necessary to clothe the idea in such a vague phrase as "for meeting the expenses of government or for some other purpose." It would be better to omit all mention of the purpose, if it cannot be clearly expressed.

As Dr. Ely informs us in the preface that the work is not intended for specialists, it would be unfair to lay too much stress upon certain omissions in Part I, as, *e.g.,* in the definition of direct and indirect taxes, where no mention at all is made of various explanations other than the author's. The book fulfils its avowed purpose of being a popular work by giving the accepted general principles in an unvarnished and easily intelligible fashion. And one interesting feature consists in the abundant use of more or less unfamiliar illustrations drawn chiefly from American experience.

Part II, or "Taxation as it is," is evidently the result of considerable labor. The chapter on colonial taxation does not pretend to be exhaustive, and naturally leaves the greater portion of the field still open to searchers. Thus, *e.g.,* no mention is made of the forced loans in New

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York, of the chimney taxes in various colonies, *etc.* The distinction again between the property tax and the land tax in the different colonies is not carefully developed. A comprehensive account of colonial taxation would touch on all these topics and many more. Many of the colonial peculiarities may be directly traced to English precedents. So the provision (which Dr. Ely finds so curious) that each taxable was required to tell what his neighbors were worth (page 141) is nothing but a reapplication of the common mediæval rule, found already in the grant of the fifteenth to Henry III in 1225. The account of what the author calls the transition period from the colonial system to the method of taxing all property, is somewhat fragmentary, owing as it seems mainly to inability to procure the facts. Here there are great gaps to be filled in future. By far the best chapters in this part are those republished from the Maryland report and containing the result of the author's researches into the actual experience of several states. The net result is to reinforce the judgment of all experts on the matter, that the attempt to reach all property is and must be a lamentable failure.

In Part III, or "Taxation as it should be," are contained Dr. Ely's propositions for a reform of our system. The main points were already touched upon in the Maryland report, and but little has been changed in this volume. The income tax is upheld, and the proportional rather than the progressive principle is favored. Dr. Ely is certainly correct in his assertion that the opposition to an income tax has been grossly exaggerated. Those who escape all taxation through the present methods are indeed opposed to it; but it will be found on examination that many business men, especially in those localities where any attempt is made to enforce the taxation of personal property, are in reality not at all inimical to the income tax. The objections to it obtain in still greater degree against the personal property tax.

The elaborate bill drawn up by the Maryland commission, and containing some of these reform projects, met with the usual fate of such measures: it was quietly killed and laid to rest, chiefly through the agency of interested parties. But many of the suggestions contained in Dr. Ely's book are worthy of notice by our legislators. It is a striking fact that we are still coping with a series of questions long since adjudged in other countries, and Dr. Ely at least deserves the credit of being the first to write, if not a comprehensive, yet at all events an instructive work on the subject. The value of his practical experience as tax commissioner is seen in his handling of pending problems. The work is not so much a serious contribution to the science proper as a plain and temperate discussion of every-day facts. In this lies its usefulness.

EDWIN R. A. SELIGMAN.

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Principles of the Economic Philosophy of Society, Government, and Industry. By VAN BUREN DENSLOW, LL.D. CASSELL & Co., London and New York, 1888. — 706 pp.

This work is, in the main, a treatise on economic politics, with especial reference to the American system of protection of industries. It is an uncompromising defence of that system. "The art," says Dr. Denslow, "of which political economy aims to present the scientific theory, is economic statesmanship." The science has suffered from not having been taught by practical men. "One could not reasonably ask a Pitt to retire from the cabinet, or a Hamilton from the treasury to become an instructor of youth." [Page 8.] In so far, however, as statesmen and, especially, American congressmen have instructed their constituents, the results are of the highest value. "The chapters bearing on economic topics in the writings of Hamilton, Horace Greeley, and James G. Blaine, and in the speeches of the great debaters in Congress, form an inexhaustible mine of economic instruction." [Page 38.]

It will be inferred that Dr. Denslow's work is not written in a judicial spirit. Its partisanship is, in fact, of a very pronounced type; and it has suffered in its form as well as in its spirit by reason of its relation to the literature of political controversy. It contains too many opprobrious epithets for a scientific work, and too many inaccurate statements of facts.

The earlier half of the book, which is devoted to a discussion of more general principles, may be regarded as an *apologia pro vita nostra*, in the sense of a defence of the existing system of social industry in all its important particulars. This defence goes too far for the best results. The title to property, as Dr. Denslow courageously states, originates in seizure, the result of which is afterwards ratified by the state because of its useful effects. The wage relation historically originated in force; the present system is traceable to the servile systems of earlier days, and bears some marks of its parentage. "Subordination is the one thing bought and paid for in the wage contract." "The essence of the wage contract is not the sale of labor, but of obedience, sovereignty or will." [Page 182.] The unwelcome truth which President McMahon pronounced concerning the political world would thus seem to hold true of the economic: "I am able to see that there are but two classes of men; namely, those who command and those who must obey."

The originator of distinctively social production is not the laborer. "In the economic sense he (the laborer) is converted from a commodity for which there is no demand, into a worker, co-operating to make society wealthy, by the profit-maker, who has the initiative in industry, *etc.*" [Page 168.] "Is it not absolutely true that the profit-maker is

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the sole producer . . . ?" [Page 169.] Poverty, "in the sense of an immediate and pressing necessity that one shall work in order to escape physical suffering from hunger and nakedness," is a necessary and permanent economic force, since men will not do disagreeable work except under such a pressure. It is clear that if an aim of the argument be to convince opponents, these positions have their weakness.

The most interesting passage in the book is that [pages 171 *et seq.*] in which the view is advanced that the labor of one man and the amount of capital necessary in order to employ him have an ethical right to equal gains. If $1200 will set a man at work, then the labor, on the one hand, and this unit of capital on the other, should share alike in the product. Each is indispensable to the other, and therefore "equal service, equal pay" should be the rule. Dr. Denslow endeavors to show by statistics that this rule of division is actually though unconsciously obeyed, in the distribution of social wealth, and that laborers actually get one half of the product of the industry of society.

J. B. CLARK.

A History of Political Economy. By JOHN KELLS INGRAM, LL.D., Fellow of Trinity College, Dublin. With Preface by Prof. E. J. JAMES, Ph.D., University of Pennsylvania. New York, Macmillan and Co., 1888. — 8vo, xviii, 250 pp.

Since the books of Travers Twiss and McCulloch, published more than forty years ago, not a single work had appeared in English, devoted to the history of economic theory, until the last edition of the *Encyclopædia Britannica*. This contained, under the heading "Political Economy," an article by Dr. Ingram, which immediately attracted the attention of students, and which is here reprinted, with a few additions, in book form.

The volume itself is based mainly on the works of Kautz, Roscher and the German historians that have succeeded them. It shows accordingly, some of their merits as well as some of their defects. Prominent among the latter is the entirely inadequate account of mediæval economic ideas. Dr. Ingram devotes just six pages to this subject, and fails to make mention of the host of writers who, in England as elsewhere, made some notable contributions to mediæval theory. To those who have grasped the idea that every epoch has its economic institutions and its economic theories, the middle ages present a most fruitful field for investigation. A chapter on the English writers on usury, trade, agriculture, *etc.*, to say nothing of the contemporary continental authors, would have been most instructive, and is in fact indispensable to a complete history of the science. It is also to be regretted that there is no

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chapter devoted to the Roman economic ideas, especially as expounded in the juristic literature. A history of political economy does not necessarily treat of modern economics only; and the Roman economy, especially in the later empire, is by far too important a subject to be slurred over as it is by Mr. Ingram. The omission is the less excusable because there is no lack of special studies on the topic. In the history of the mercantilistic doctrines, again, Mr. Ingram seems to have followed Roscher far too closely in his entirely inadequate account of the English writers and of the true inwardness of the "balance of trade" doctrine. Here again the special literature is not lacking, and might have been used by Mr. Ingram, if he were not in a position to consult the original sources themselves. The work, while ostensibly a history of political economy, is therefore in reality a history of modern economics only.

In other respects also Mr. Ingram follows the German models too closely. Thus the account of Ricardo and his social aims is based mainly on the views of Held in his *Soziale Geschichte Englands*. But it is now almost universally acknowledged, even by the Germans themselves, that Held's analysis of Ricardo is ridiculously one-sided, and that a few isolated passages cannot fairly be twisted into a general exposition of social views. Ricardo, as contemporary evidence amply proves, was by no means such an anti-social monster, or such a hard-hearted middle-class man as Held and Ingram (especially in his article "Ricardo" in the *Encyclopædia Britannica*) would have us imagine. Mr. Ingram follows the Germans of ten years ago in the excessive reaction against the Ricardo cult, but he seems not to have been affected by the recent change in the current against the extreme historical school. In reference to Ricardo, Cohn and Knies, Wagner and Menger are safer guides than Held and Schmoller.

The bibliographical note (pp. xiv, xv) is quite defective. It omits such general histories as Hildebrand, *Die Nationalökonomie der Gegenwart und Zukunft;* Contzen, *Geschichte, Literatur und Bedeutung der Nationalökonomie;* Walcker, *Geschichte der Nationalökonomie;* Trinchera, *Storia critica dell' economia pubblica;* and such special histories as that of Laspeyres, *Geschichte der volkswirthschaftlichen Anschauungen der Niederländer*, and of Contzen and Endemann on the canonic doctrines, *etc.*

In general, however, Dr. Ingram displays a fairly thorough acquaintance with the modern literature of his subject. His whole spirit is in harmony with that of the historical and statistical school; and his book, while by no means an exhaustive treatise or free from exaggerations, may be put in the hands of students as a fairly trustworthy guide, so far as it goes.

E. R. A. S.

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Peel and O'Connell. A review of the Irish policy of Parliament from the Act of Union to the death of Sir Robert Peel. By the Right Hon. G. SHAW LEFEVRE, M. P. London, Kegan Paul, Trench & Co., 1887. — 8vo, vi, 357 pp.

Irish Legislative Systems. Historical Review of the Legislative Systems operative in Ireland, from the Invasion of Henry II to the Union (1172–1800). By the Right Hon. J. T. BALL, LL.D., D.C.L. London and New York, Longmans, Green & Co., 1888. — 8vo, vii, 256 pp.

Taken in the inverse order of their publication, these two works afford a pretty complete view of Ireland's constitutional history from her earliest connection with England to the middle of the present century. Both authors acknowledge their indebtedness to the home-rule agitation as a stimulus to the production of their books; both treat of subjects that have not been presented in the same compass before; and both deal with their respective subjects in a way that must win the profoundest respect of every searcher after the truth of Irish history. It needs no very extensive acquaintance with the literature of Ireland's relations with England to satisfy any one of the utter worthlessness of nine-tenths of all that is written on the subject. Nor is this so much to be wondered at, when the intensity of race and religious prejudice is considered. Accordingly, when a reasonably impartial presentation of any phase of Irish history is met with, an emphatic recognition must be given to it. Such recognition is due to Shaw Lefevre. But when, in the year 1888, only two years after Mr. Gladstone's attempt to grant an independent legislature to Ireland, a discussion of one of the most important topics of Irish constitutional law appears, written by a privy councillor of the United Kingdom, and yet not revealing to critical examination what the author's view of home rule is, — in such a case, the resources of eulogy must be severely taxed to do justice to the subject. Whatever meed of praise such a tax would produce must be assigned to Dr. Ball.

The *History of Irish Legislative Systems* contains precisely what the author, in the preface, announces his purpose to produce, "a consecutive narrative which shall trace the succession of these systems to each other, the forms they respectively assumed, and their distinctive peculiarities." The principal questions involved in such a narrative are the origin and development of the Irish Parliament and its relation, whether of subordination or independence, to the Parliament of England. As to the first of these, time has left but scanty data from which to derive satisfactory conclusions. Such scattered evidence as does exist is concisely stated in Dr. Ball's opening chapters. The second question affords much more ample ground for discussion, and it is the summary of the long progress

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of this dispute to a final settlement in 1800 that constitutes the main thread of the narrative. It is safe to say that the statement of the arguments on the two sides of the question is absolutely impartial, and that this is about the only book ever written on the subject of which the same can be said. The author's attitude is that of a just judge. He fairly states the views of the contending parties, but at the same time he feels no hesitation in indicating which seems to him the stronger case. The long controversy as to whether Henry II conquered Ireland in any such sense as to be justified in assuming the rights of a conqueror, he decides by the non-technical but eminently sensible dictum, that while Henry probably did not kill enough of the natives to satisfy the strict conception of a conquest, he did terrify them quite sufficiently for that purpose. And again, as to the endlessly mooted question whether in the earliest times the English Parliaments claimed and exercised the right of legislating for Ireland, he reaches the conclusion, which must satisfy any student more rational than an English Tory or an Irish Nationalist, that, since in those days the abstract principles of parliamentary government had not yet been developed, the relations of the two Parliaments could scarcely have been determined by any of the refined theories which later generations have sought to apply to them. The Parliaments of the twelfth and thirteenth centuries bore little resemblance, either in constitution or in functions, to those of the seventeenth and eighteenth. The relations of the former, therefore, are of the slightest possible importance in determining those of the latter. Bolton, Molyneux, and Mayart based elaborate legal arguments on early parliamentary history, but the practical solution of the problem under the house of Hanover was based on political calculations, arising out of circumstances to which the Plantagenet régime afforded not the remotest analogy. Dr. Ball's account of the progress of the question through its political phase down to the union is characterized by the same judicial tone that is manifest in the earlier chapters; and nothing reflects greater credit on the author's judgment than his resolution, announced in the preface and rigorously adhered to in the text, to exclude from his account of the union "questions which have been raised respecting the means employed to induce adoption of the policy of Union by the Irish Parliament, and also respecting the degree of support which, when proposed, this policy received outside Parliament." The narrative probably loses in picturesqueness by this exclusion, but the author escapes a strain on his attitude of non-partisanship which even he might have been unable to resist.

In qualifications for an impartial view of Irish affairs, Shaw Lefevre is distinctly at a disadvantage as compared with Dr. Ball. Not only does his work treat of a more recent period than that noticed above,

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but he himself, as an active member of Mr. Gladstone's last ministry, must necessarily be burdened with a greater mass of personal feeling and political interest in the subject of which he treats. That his sketch of Parliament's course toward Ireland for fifty years is on the whole a trustworthy work is therefore very creditable to the right honorable author. It cannot be said that his attitude toward home rule may not be inferred from the book. Speaking of Grattan's death, he says: "His tomb in the Abbey and his statue in St. Stephen's Hall are proofs that it was even then possible to hold that Ireland ought to have an independent legislature, without losing the claim to imperial honor as a patriot and statesman." Some scattered allusions of this sort, together with just the faintest roseate tinge in the view of O'Connell's purposes and methods and a scarcely perceptible deepening of the shadows about Peel, are, however, the sole evidences of personal bias in the writer. The men and measures of the period covered are, on the whole, portrayed with the most perfect fidelity to fact. If the general effect of the narrative is a justification of Gladstone's attitude toward the Home-rulers, that result cannot be attributed to any perversion of the records of history.

It is to the account of the repeal movement that the reader will most naturally turn at the present time. On this issue it was that the two great antagonists had their final grapple. Disappointed in his hopes of reforms in Ireland through the Whigs, O'Connell, in 1841, threw himself unreservedly upon the support of the Irish masses. The character of these supporters, together with his methods of holding their favor, served speedily to bring into prominence the nationalist sentiment which ever since the French revolution has animated a powerful fraction of the Irish people. Shaw Lefevre points out, what is undoubtedly true, that the basis of O'Connell's assaults upon the political relations of the two islands was real grievances rather than mere sentimental concessions to the national feeling. The prominent manifestation of this feeling, however, sharply stimulated the antagonism of the British middle classes. It was with them that the weight of political power in England then rested, and with their hearty support Peel, who was especially their representative, crushed the movement against the union. It is important to notice that since that time the political centre of gravity in both England and Ireland has descended several degrees in the social scale. The English supporters of Peel are overwhelmed by the democracy which follows Gladstone. The Irish followers of O'Connell have now a parliamentary influence under Parnell which they scarcely dreamed of in the forties. This alteration of relations cannot but make a vast difference in the result of the political issue which has once more arisen out of economical grievances in Ireland. What this result is likely to be, Shaw

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Lefevre only hints at; but the bearing of his hint may easily be inferred from his relations with Mr. Gladstone.

So long as the present form of connection between England and Ireland shall continue, so long will it afford a convenient target for the agitators of Irish grievances. O'Connell set the pitch to which all his successors will tune their trumpets till the walls of the unionist Jericho tumble. The history of the project of union lends itself readily to the purposes of its assailants. It was conceived in the terror of French invasion; it was brought forth in the iniquity of unblushing parliamentary corruption; and it was nurtured in the deceit of unfulfilled promises to the Catholics. The scheme was probably essential to the success of Pitt's plans in continental politics. Carried out with the emancipation of the Catholics, which he conceived to be an indispensable feature of the project, it would have materially altered the whole course of Irish history. But the insane obstinacy of George III converted the system into an instrument for the perpetuation of the ancient and hateful Protestant ascendancy. To the maintenance of this interest Peel was the devoted servant. O'Connell broke its legal supremacy in 1829. The survival of its power through the policy of the executive led to the demand for a legislature, at least, free from its influence. This demand Peel met with successful resistance. But the illogical character of the governmental connection, as exposed by O'Connell, can never be hid. The so-called union of the two kingdoms was only a modification in legislative relations. The executive remains practically as it was established by Henry II. A viceroy at Dublin, with an administration highly centralized, supervises Irish affairs at the nod of an English ministry. The union of the Parliaments early proved to be merely the absorption of the less by the greater. A vast British majority scorned all consideration of peculiarly Irish interests. Neither in legislature nor in executive had these interests any effective representation. But a population of from five to eight million souls, distinct in race, in religion, and in social and economical characteristics, inevitably has peculiar interests of great magnitude. O'Connell sought to give these interests the governmental agency which the union took away. He failed; but he did not fail entirely. The work in which his influence lives to this day is that of solid organization for peaceful agitation. He utterly repudiated force in attaining his ends. Revolutionists found no mercy at his hands. But he drew into the political agitation that factor which has since proved so potent, both as a frame for organization and as an instrument of far-reaching influence, — the Catholic priesthood.

O'Connell is the connecting link between Grattan and Parnell. He completed the settlement of the religious issue which the former had

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pushed into prominence; he inaugurated the movement for reform of the land tenure with which the latter has become most closely identified. Peel is the connecting link between George III and Gladstone. From the violent anti-Hibernian policy of the former, he eased himself down by slow degrees to a plane of moderation from which the latter has passed to that of free concession. Peel believed that sufficient concession could be made for the common welfare of both islands without a modification of the existing governmental relations. Gladstone has announced his belief that some such modification is necessary. Home rule is not repeal, but it is a compromise between the two extreme views in reference to the union. Back of the question of home rule, however, lies the land question; and it is the settlement of this, rather than of the former, that is the task laid out for modern statesmen.

WM. A. DUNNING.

The Pioneers and Progress of English Farming. By ROWLAND E. PROTHERO. London and New York, Longmans, Green & Co., 1888. — 290 pp.

This book contains a well written review of the history of English agriculture. Emphasis is laid especially upon the periods of change through which it has passed and the causes therefor. The causes of the present agricultural depression in England are traced, and the various remedies which have been proposed are discussed and carefully weighed.

The historical sketch with which the work begins is based upon the hypothesis that the village community was introduced into England by the early German conquerors and prevailed for centuries over more than half of its territory. Upon this was superimposed the Norman manorial system. A combination of the two modes of culture lasted till the close of the Wars of the Roses. Then, corresponding to the downfall of feudalism, occurred the first great crisis in agriculture. It was marked by a general enclosure of commons and the substitution of grazing for the ancient form of tillage, that thereby the wool markets of the continent might be supplied. The motive which led to the change was the desire for greater profit than could be obtained under the mediæval system. Pasturage continued, with periods of depression and prosperity, to be the chief feature of English farming till the latter half of the eighteenth century. Then the development of a much larger market, caused by the rise of the factory system, necessitated another revolution in agriculture. Still more commons were enclosed, pasturage was abandoned and tillage with a system of large farms substituted. Scientific ideas concerning agriculture began to spread. Improvements were introduced in the breed of stock. The cultivation of turnips and clover began. Better

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highways, canals, and finally railroads facilitated transportation. War prices, which prevailed especially during the struggle with Napoleon, and the tendency of the corn laws to promote speculation in land, contributed to attract capital towards agriculture, till not only the commons disappeared, but also the English yeoman, the small freeholder. But agriculture upon the large farm system was, previous to 1845, rather extensive than intensive, because it enjoyed the protection of the corn laws. When they were abolished, the landlord and tenant were forced to call in to the fullest extent the help of science, because they must maintain themselves unaided against the competition of the world. Everything seemed to go well till 1873. Seasons were on the whole good. The Civil war in America and the series of struggles in Europe between 1866 and 1871 furnished England with ample markets. But the high prices which they occasioned promoted speculation. The reaction came in the form of the crisis of 1873-78. It has been extremely difficult for agriculture to recover from the effects of this, because of the many poor harvests between 1872 and 1880; because of the appreciation in the value of gold; and last, but chiefly, because of the influence of foreign competition in breadstuffs, meat, and dairy produce.

Having, unlike Professor Rogers, shown that the English landlord system is the direct outgrowth of social necessities, and not the result of spoliation, Mr. Prothero argues further that the time has now come for another revolution in English agriculture equal in thoroughness to those of the sixteenth and the eighteenth centuries. He sounds a note of warning however against theories of land nationalization. He protests against the treatment of property in land as if it rested on a basis different from that of personalty. He holds that the introduction of peasant proprietorship on a large scale would not remove the depression, because continental countries suffer from it quite as truly as England. Neither would conservative opinion approve of a reduction of the tithe-rent charge. A return to protection is not to be thought of.

The English agriculturists are then, according to Mr. Prothero, to look for relief to reforms in the land laws, facilitating transfers and abolishing entail; to a readjustment of local taxation which shall adapt it to the régime of free trade; to the extension of technical education in agriculture; and to the regulation of railway charges so as to prevent discrimination against the home producer. But after government has done its best, the English landlords and tenants must still depend chiefly upon themselves, if they are to escape from existing difficulties. Mr. Prothero believes that the above remedies would smooth the way for a partial breaking up of estates and a large increase in the number of small farms. The proprietors of these will still find it profitable to breed and fatten the best stock and produce fresh perishable articles of food for

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the home market. Continuous, hard, and intelligent labor will be necessary. Many laborers will be thrown out of work. Such a result is incident to all revolutions. But in the end importations of certain important classes of goods will be checked and a situation reached which can be maintained with ease till the present inequalities in international competition pass away.

The book closes with a series of appendices containing valuable statistical material. It furnishes an excellent example of sober argument based upon broad historical research. It would be well for both American protectionists and free-traders, if they would notice how slight is the value which is attributed to their sovereign remedies.

H. L. OSGOOD.

Selections Illustrating Economic History since the Seven Years' War. Compiled by BENJAMIN RAND, Ph.D. Cambridge, Waterman and Amee, 1888. — 8vo, vii, 367 pp.

This volume is designed to offer students attending lectures in economic history a course of reading illustrating the most important episodes in this field since 1763. The compiler, however, has also consulted the interests of the general reader. The exact character of the work may be shown by a brief list of the contents better than by any description. The "Colonial System" is naturally the first subject, and upon it are given the leading sections of the English navigation acts and Adam Smith's discussion of it. The effect of the great inventions is shown by a selection from Walpole's *History of England.* On the economic condition of Europe in the Revolutionary and Napoleonic age, the compiler gives us von Sybel's valuable introductory chapter to his history of the Revolution, a discussion of the emancipating edict of Stein from Prof. Seeley's *Life of Stein,* a discussion of the Orders in Council from Levi's *History of British Commerce,* and a review of English finances from 1793–1815 from Porter's *Progress of the Nation.* Five chapters are devoted to the next fifty years, and comprise the following subjects: the *Zollverein* is described from Bowring's Parliamentary report of 1840 with statistical information from Legoyt's *La France et l'étranger.* Next come another selection from Levi, discussing the corn laws, two essays by Cairnes on *The New Gold,* and a review of the financial history of France under the second empire from Levasseur's *Histoire des classes ouvrières en France, depuis 1789 jusqu'à nos jours.* Four chapters are devoted to the last twenty-five years. In them we have a description of the way in which the French indemnity was paid, from an article in *Blackwood's Magazine* (Feb. 1875) based on Léon Say's report, together with a statement of what was done with

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it from Kolb's *Condition of the Nations;* a chapter on "New Italy" from Wilson's *Resources of Modern Countries;* selections from the census reports of 1880 discussing the growth of population, the factory system, cotton manufacture, and the iron and steel industry in the United States; and lastly, a discussion of the public debts of Europe. This is taken from Neymarck's recent work on the subject, and is one of the most interesting selections in the volume.

It will be seen that the range of this compilation is extensive and that the matter is of high quality. The chapter on the "Great Inventions" might well have been supplemented, as it is rather inadequate. The inventions discussed are those of Arkwright, Hargreaves, Crompton, Cartwright, Watt, and Davy, in other words, the improvements in cloth making, the use of steam for stationary machinery, and the safety lamp for coal mining. The application of steam to transportation deserved at least a chapter. No feature of modern economic life is more important than the transportation system, nor has any been more marvellously changed since 1763. Whitney's invention of the cotton gin had such an immense influence upon our economic and political life that it should have received attention under this head.

The bibliographical references might well be fuller. The date, publisher, and edition of the works from which extracts are taken should be given. The full title of Levasseur's work should have been given, as above, instead of merely *Histoire des classes ouvrières,* for that applies equally well to his earlier and better known work which stops with the Revolution. The proof reading of the selection from Levasseur seems not so well done as in the case of other chapters. On page 226 *repres* is printed for *repris;* in the last paragraph on this page the subject of *éclata* is missing, and in note 6, page 228, we have *garatie* and *granantie* for *garantie.* In note 2, page 59, Lullin de Chateauvieux appears as two persons: "Lullinde, Chateauvieux" and Lavergne as "Lavergen." It may be worth while to remark that whoever attempts to look up von Sybel's references to Arthur Young in this chapter will get little satisfaction. Von Sybel used and referred to a German translation. The English translator transferred the references, leaving out von Sybel's notice that they were to a German edition. In the note on page 52, for "the latter" read "the former," as consultation of the original will show. It would no doubt be altogether too exacting to hold Dr. Rand responsible for these last points, yet it is always safe to verify references. The mechanical execution of the volume is excellent.

Dr. Rand has rendered economic study a service which teachers will truly appreciate, particularly those who have very large classes and those whose classes do not have access to good libraries. It is to be hoped that it will meet with such success as will encourage Dr. Rand to pub-

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lish a second series devoted to the economic history of our own country since the opening of the Revolutionary war. Such a work would prove even more useful than the present volume to the general body of teachers of political economy in all but our largest institutions.

EDWARD G. BOURNE.

A History of Vagrants and Vagrancy and Beggars and Begging. By C. J. RIBTON TURNER. London, Chapman and Hall, 1887.—8vo, xxii, 720 pp.

The importance of this work lies more in the wealth of curious detail than in any definiteness of conclusion. It can scarcely be called a scientific work in the sense of Dr. Aschrott's book. Its arrangement is not compact or orderly and the various countries are described one after the other without much attempt at comparison or induction. But what the author lacks in precision of scientific aim, he partly atones for in abundance of knowledge. Over three-quarters of the book is devoted to Great Britain, and full use has been made not only of the legislation but also of the municipal records and contemporary literature. The result is a most interesting and quaint history of mendicity, especially during the later and middle ages, such as it would be difficult to find in any other publication. The long chapter of one hundred pages containing extracts from various writers to illustrate the impostures of the vagrant and the beggar in the middle ages is most delectable reading. One is forced to the conclusion that the foibles of mankind do not change much from age to age.

For the nineteenth century copious extracts are made from the proceedings of committees of the various poor-law unions. But here again the work is mainly descriptive, not critical. About the only conclusion which Mr. Turner succeeds in drawing is that the present English legislation as to vagrants, while a great improvement on the old, nevertheless seems to be framed with a sublime disregard for modern conditions; and that it results in giving people a right to travel through the country at public expense. His remedy — houses of industry for vagabond adults — is simply mentioned in an off-hand way.

The history of the continental countries of Europe is rather superficially treated. On the other hand the complete index of British statutes on the subject of poor-laws will be found very useful. If the plan of the book had been more scientific, it would have been of far greater service to the student. As it stands the work is simply a repertory of interesting facts and anecdotes, which it is convenient but not indispensable to have at hand.

E. R. A. S.

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La Morale économique. Par G. DE MOLINARI, correspondent de l'Institut, rédacteur en chef du *Journal des Économistes.* Guillaumin et Cie, Paris. — 8vo, 418 pp.

This book is closely related to the author's earlier work, *Les lois naturelles de l'économie politique.* Besides being generally suggestive, it will render an especial service to any whose idea of the relation of ethics to economics leads them either to confound the two or to try to force them into an unnatural separation. The views advanced in this volume will, indeed, hardly be accepted by believers in non-utilitarian ethics; it is premises, however, rather than deductions, that will be the object of criticism. The work is Ricardian in its exactness and consistency, as well as in its economic tendency.

Ethics and economics are, according to M. de Molinari, alike in recognizing as their *summum bonum* the attainment, by humanity as a whole, of the maximum of gratification at the cost of a minimum of pain. Man's organized efforts to attain this end constitute, practically, the sum total of social activities, and furnish the materials for ethics. Conflicts arise in the economic field; the individual is bound to subordinate his interests to those of his race. This is a general and permanent law; but the application of it varies with economic conditions. Rules of conduct change with advancing civilization. "At the origin of the species, competition had no other mode of operation than robbery and murder. Man lives at the cost of other species, and contends for his existence with them." The failure of wild game to furnish food for increasing numbers of men leads tribes of savages to seek to expel each other from common hunting grounds, or, in cannibal fashion, to make wild game of each other. The extermination of the less capable individuals is, in such conditions, advantageous to humanity and therefore moral. This rule is abolished when men are organized into nations; robbery and murder are no longer useful, and are therefore no longer justifiable within national limits. The contest for survival is transferred to a higher plane; and now international wars may be useful and right. The establishment of sufficiently close bonds, commercial or otherwise, among the nations of the world will end the utility of wars, and thus reverse their moral quality.

The author keeps constantly in view the natural economic laws discussed in his former treatise. He examines the protective and repressive action of criminal law, religion, and public opinion, and the influence of the fine arts, of literature, of the theatre, and of the school. He makes an extended study of "the genesis of morals," and of the crisis that has come in human relations in consequence of industrial and political progress. He incidentally puts in a clear light the action of

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the tariff wars in which European nations are now engaged. He shows the effect of extending the privilege of self-government to great populations that are not ready for it, and exhibits the ignoble quality of modern politics which resolve elections into *quasi*-economic contests for the possession of lucrative positions. These are only a few of the prominent points in the discussion of the general theme. The concluding part of the work is devoted to a study of "the new order" that is establishing itself by the merging of many nations in a general "economic state." The volume contains appendices on "the results of the wars of the Revolution and the Empire," and on "a plan for the establishment of a league of neutral powers."

J. B. CLARK.

Histoire des droits d'entrée et d'octroi à Paris. Par A. DE ST. JULIEN et G. BIENAYMÉ. Paris, Paul Dupont, 1887. — 8vo, 148 pp., tableaux iv, 148 pp.

Among the most grievous of all forms of taxation are the municipal customs duties or excises which are still found to-day on the continent under the name of *octroi*. In the middle ages they were all but universal. The nineteenth century has witnessed strenuous efforts on the part of several governments to secure their total abolition. But in France these taxes continue in almost unabated vigor, and still form the main source of municipal income to-day. The present work is interesting as being the first to give an exhaustive history and description of the Parisian *octroi*. Mention is made of the indirect taxes during the Gallo-Roman régime, but the first definite trace of municipal duties is found in the twelfth century, on wine. From this period until the Revolution the taxes gradually increased in number and extent, until they covered almost everything. Some of the most common were known as *chaussées*, *petit ponts*, *rouages*, *rivages*, *conduits*, *chantelages*, *tonlieux*, *coutumes*, *congiés*, and *hallages*. The Revolution abolished them all, but they were quickly reinstituted, at least in part, under the somewhat timid name of *octroi municipal et de bienfaisance*. The only difference now was, that the taxes were henceforth levied only on commodities destined for local consumption. The revolution of 1848, and the financial exigencies of 1870–71 led to a further increase in the number of articles subject to the duties, so that to-day seventy-eight commodities, including all the necessaries of life, are dutiable. An appendix contains a detailed description of each of the one hundred and twenty-three tariffs, beginning with the year 1121.

E. R. A. S.

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Die Frage des internationalen Arbeiterschutzes. Nebst einer Kritik der Ansicht Gustav Cohns. Von Dr. GEORG ADLER, Dozent der National-ökonomie und Finanzwissenschaft an der Universität Freiburg. München u. Leipzig, 1888. G. Hirth's Verlag. — 8vo, 113 pp.

Dr. Adler's whole argument for international legislation in behalf of the laboring classes is based upon the assumption that labor laws, when carried to a satisfactory extent, — as, for example, in England at the present time, — tend to lessen the productive capability of the laborers in proportion to their wages. In consequence, the labor cost of articles produced is increased, and the nation with such laws is placed at a disadvantage in competition in the markets of the world. The "Reports of the Royal Commission appointed to inquire into the Depression of Trade and Industry" in England (1885–1887), and an article in Conrad's *Jahrbücher für National-ökonomie und Statistik*, by Professor E. Nasse, are cited as authorities for this view, — a view that has often been controverted; though, of course, the whole question turns upon the opinion of the writer as to what legislation in behalf of laborers would be considered sufficient.

As such laws, regulating the labor of women and children, fixing the length of the normal working-day, *etc.*, are necessary to prevent the physical and moral deterioration of the working classes, such legislation should, by means of treaties, be entered upon simultaneously by all the leading industrial nations of Europe. Unless the nations are placed upon an equality in this regard, the probable result will be that in the more advanced nations, by international competition, wages will be forced down, and the condition of the laborer will eventually be reduced to that of the laborer in the countries less advanced. It is even suggested that in the course of time it may become necessary to force China and Japan into such a league, or to cut off their competition by tariff laws, or otherwise. In support of this view, it is urged that wages in England are already on the decline; the competition of Germany has already become too strong, and unless Germany passes labor laws as advanced as those in England, the English workingman will be forced still nearer to the condition of the German laborer.

The legislation recommended by the author as suitable for adoption by the leading industrial nations is certainly in itself not at all unreasonable. It may be briefly summed up as follows:

(1) Children under thirteen years of age not to be employed in factories and shops.

(2) Working day of ten hours for men.

(3) Prohibition of Sunday labor in factories and shops.

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(4) For young persons (from thirteen to sixteen years) and married women, maximum working day one-half that for men.

(5) Young persons and women forbidden to work in certain branches of industry in which the character of the work would endanger health or morals.

(6) Maximum labor day of ten hours for all young persons (thirteen to eighteen years) engaged in house industries.

(7) Certain methods of manufacture dangerous to health, forbidden.

Of course, fitting exceptions and exact specifications, where needed, to be made in the law.

The book is ably written, is very interesting and suggestive, and the author has made the great desirability of such international legislation clearly manifest. In my opinion, however, he has somewhat overestimated the effect of the labor laws in international competition, and underestimated other factors, so that the need is not quite so pressing as he implies. Again, he seems to underestimate the influence of national legislation in lessening the need for such international arrangements. While it may be true that a nation cannot carry out all the measures that would be desirable for the protection and benefit of its laborers so long as competing nations make no move in this direction, it is nevertheless also true, as Dr. Adler himself says, that much can be done without lessening the ability to compete. Besides this, every step beyond the point of greatest competing power taken by the competing nations to help their laborers enables the advanced nation to do still more — and proportionally more — for its workingmen. The nations of Europe that are really to be classed as great industrial nations are already all moving towards suitable labor legislation, and there is no reason to think that still more advanced ground will not be taken by them.

The author's proposal of an international bureau of supervision to publish reports of the factory inspectors, to note infractions of the law in the various countries and, upon investigation, to publish full reports regarding them, *etc.*, in order that thus the individual governments may be in a measure coerced to carry out faithfully the provisions of the treaty, seems impracticable. Though nations might in time agree upon uniform legislation, they would scarcely acknowledge the necessity of an international bureau of espionage, to see that the laws were executed. Each would insist, we may be sure, upon being trusted with the sole, independent execution of the law within its own territory.

Doubtless the influence of treaties on this subject, if they could be made among all the leading European nations, would be excellent, and that in many more ways than the one indicated by Dr. Adler. The

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agitation advocated by him in favor of such international legislation is likely to do good, whether the end desired be reached or not, and is to be favored.

The account of what has been already done, the sketch of the history of the movement, is complete and very interesting, and would seem to promise much for the future. But the author himself, in spite of the moderation of his plans and his apparent willingness to wait for results, — for he says that such treaties are not to be expected in the immediate future, — in spite, too, of the great advances that the idea seems to have made in all Europe within the last few years, still seems hopeless of the final result; for he speaks, in conclusion, of the way for the accomplishment of the plan as one yet to be found, and contents himself with adding: "Where is a will, there is a way." J. W. JENKS.

Third Annual Report of the Commissioner of Labor, 1887: *Strikes and Lockouts*. Washington: Government Printing Office, 1888. — 8vo, 1172 pp.

This report, which was ready for transmission almost a year ago, purports to give the statistics of all the strikes and lockouts occurring in the United States during the years 1881 to 1886 inclusive. The files of the leading papers were consulted and a list made of all strikes which had been reported during that period. Special agents were then sent to the localities, and they gathered the best information they could concerning each difficulty. These reports are here tabulated and show the number of establishments affected by strikes and lockouts, the number of strikers, the length of time each strike lasted, its cause, the success or partial success or failure, the industry involved, the new employees engaged, the loss in wages and the loss to employers, *etc.*

The only serious question to be considered by the critic of such a volume as this is, whether the method adopted is sufficiently accurate and certain to enable us to trust the results. In the present case the question is to be answered in the affirmative. Absolute accuracy, of course, is not to be attained in any such investigation. For instance, employers and employees will differ as to the length of an unsuccessful strike. The employer will say that the strike ceased as soon as he got enough new hands to start running again; while the employees will wait until the strike has been declared off by some labor organization. The judgment of the special agent must decide the question; and, as in almost all social statistics, we then have statistics of the opinions of experts rather than statistics of actual occurrences.

The commissioner has shown his acumen in tabulating the statistics according to the establishments affected rather than by strikes spreading

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through many establishments. Thereby we get a perfectly certain unit of measurement. It is true that establishments differ in size from the "Gould system" down to the little town bakery; and thus the mere number of establishments affected gives us little information. But all we have to do is to add the number of men striking and the duration of the strike in order to reach a judgment as to the relative seriousness of the disturbance at any one time or place, or in any one industry.

The economist will find that this investigation confirms the conclusions hitherto generally accepted in regard to strikes: for instance, that over one-half of them are unsuccessful; that in the great mass of cases the reason for the strike is connected with wages; that the loss to employees is enormous ($59,972,440 in six years); and that even when the strike is successful it requires three or four months of the increased wages to make up the loss. Here, however, we reach the most difficult, and at the same time most uncertain part of the investigation. The phenomena are so intricate that they escape the most refined instruments of statistical analysis and will not submit to tabulation.

RICHMOND MAYO SMITH.

Die Englische Fabrikinspektion. Ein Beitrag zur Geschichte der Fabrikgesetzgebung in England. Von OTTO W. WEYER. Tübingen, 1888, Verlag der Lauppschen Buchhandlung. — xv. 325 pp.

This purports to be the doctor's thesis of a young German-American at the university of Tübingen. It deals exhaustively with a part of the history of factory legislation in England. As the title of the book indicates, it describes chiefly the efforts hitherto made by the English government to control the labor of women and children, in factories, workshops and private houses, by means of inspectors. The administrative machinery of control, its necessity, origin, development, present condition, and the results achieved through it, form the subject-matter of the work. Original material, *viz.*, the reports of parliamentary committees and of the inspectors themselves, has been used constantly in its preparation. It is written in a spirit of strong sympathy with the objects and results of the English factory acts and of opposition to "*ultra-Smithianismus.*" The author divides the movement of which he treats into two periods, the one including the experiments at factory regulation previous to 1833, the other the act of that year and all the additions to and modifications of it which have been adopted since. The book closes with a full classified statement of the provisions of the codification act of 1878, and a discussion of some of the imperfections which still exist in the system.

The chief reason why the acts passed before 1833 accomplished so

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little was that their execution was committed to the justices of the peace and to visitors selected by them, both unpaid officials and intrusted with very little power. Often also the justices were interested parties.

But so rapidly did the evils of the factory system increase, and with them the Chartist agitation and the ten-hour movement, that it became necessary to greatly enlarge the scope of legislation, and to provide for its better enforcement. With the act of 1833 factory inspection in the proper sense of the word was introduced. The author describes very fully the difficulties against which the early inspectors had to contend and the zeal with which they pursued their work. The law was shown on trial to be imperfect in many respects. The inspectors could not gain access to all parts of the factory; almost unlimited fraud was practised in granting age permits to children whom their parents desired to send to work; a vicious relay system nullified all efforts to restrict the hours of labor; no proper instruction was given the children in the schools they were expected to attend. Moreover, the act only extended to textile industries and afforded no direct protection to women.

By 1840 the defects of the law were fully evident, but so strong a feeling in favor of the policy had been awakened that the opposition of the factory lords and of the *doctrinaire* economists could not prevent further and more sweeping legislation. By the act of 1844 the number of sub-inspectors was enlarged and the system of control made more rigid. Undiscriminating grants of age permits were checked by a better selection of certifying physicians and the bestowment upon them of limited powers as inspectors. An attempt was made to compel employers to so guard their machinery as to prevent accidents. Great difficulty, however, was found in enforcing this, and it is not until recently that full success has been attained. The power of the justices of the peace to diminish penalties was also taken away. A beginning was also made in the work of restricting female labor. The relay system did not disappear till after the laws of 1850 and 1853 established the normal labor day of ten and a half hours for women and young persons, with the half-time system of 1844 for children.

The later acts, especially those of 1864 and 1867, extending the system of regulation and inspection to all the important branches of English industry, are carefully described and their effects traced. The vast benefits which have resulted are clearly shown. The opinion that the factory acts have greatly promoted the establishment of a national system of education is also expressed. The educational effect which the discussion of these measures has had upon the English people is emphasized as an indirect but most beneficial result.

H. L. Osgood.

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Handbuch des preussischen Verwaltungsrechts. Für den praktischen Gebrauch bearbeitet von K. PAREY, Königl. Verwaltungsgerichts-Director a. D. Berlin, J. J. Heine's Verlag, 1887. — 2 volumes, vii, 323, iv, 229 pp.

This is the latest book that has been issued on the subject of Prussian administrative law. It is at the same time, as a whole, one of the least satisfactory that has ever come to my notice. Its arrangement is most extraordinary. The first volume contains matter which it is almost the universal practice to treat last; and the second volume discusses many subjects, the study of which is necessary in order to understand what has gone before. For this reason it cannot be recommended to one entering on the study of Prussian administration. It is also unsuitable for the foreign student of Prussian government, because most of those matters which are of the greatest interest to him are treated with the least fulness — indeed, they are barely touched upon. On the other hand, certain subjects which are to a great extent technical, are entered into with such thoroughness as to indicate that the book was really written, as its title page indicates, "*für den praktischen Gebrauch.*" The book will, undoubtedly, be of great use to the Prussian official and administrator, but has little value as an intelligible description of the entire Prussian administrative system. It must, however, be said of the first volume, which is devoted to *Verwaltungsprocess*, that by reason of its detail it gives an amount of exact information hardly to be found in any other published work. As this volume is devoted to one of the most interesting of German institutions, *viz.* the administrative court, no one who desires to investigate that institution thoroughly can well escape the duty of reading it. What Mr. Parey says on this subject, is said by one who knows of what he speaks; for he has been president of one of these courts. Of real interest is the distinction drawn between the *hierarchical appeal* from lower to higher officers, which has resulted from the administrative centralization, and the *judicial appeal* to the administrative courts from the decisions of the administrative authorities, which has resulted from the great administrative reforms of the last twenty-five years. As such a method of hierarchical appeals is foreign to our administrative law, the clear account given by Mr. Parey is very welcome to the student of foreign administration.

The second volume, however, is very unsatisfactory. The subject-matter is not only badly arranged, but it is not fully enough treated to give a good idea of Prussian institutions to a reader unfamiliar with them. The book must therefore be regarded as a treatise on the Prussian administrative courts and their jurisdiction, and as such is excellent. As a general handbook of Prussian administrative law it has little value.

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In his treatment of the powers of the King, Mr. Parey shows a strong royalist bias. He does not consider that the King's powers rest upon the constitution; the constitution is simply an instrument which limits them; and where any subject is not fully regulated by the constitution, the King has the same power as before the constitution was granted. This view he endeavors to base on one of Bismarck's speeches in the great constitutional conflict of 1863–66, which expressed the ideas of the government at that time. But such a conception of the Prussian constitution is certainly not held by a large number of writers, and is hardly in accordance with modern theory. FRANK J. GOODNOW.

Revaler Zollbücher und -Quittungen des 14. *Jahrhunderts.* Von Dr. WILHELM STIEDA, ord. Professor der Staatswissenschaften an der Universität Rostock. (Hansische Geschichtsquellen. Herausgegeben vom Verein für hansische Geschichte. Band V.) Halle, 1887. — cxxxviii, 107 pp.

This is one of those books, which, under the modest title of a simple edition of hitherto unpublished manuscripts, contain an immense amount of valuable information and are the result of a great deal of hard work. The *Zollbuch* which was the principal excuse for the present volume is a mere succession of names and sums of money of various standards, comprising 2673 entries. In some cases these represent the value of the dutiable merchandise, in others the duty paid. The *Zollquittungen* are an equally dry looking series of 135 tax-receipts. The introduction to these somewhat forbidding records is, however, a treatise on the Hanseatic tariffs of the latter part of the fourteenth century, and on the commerce and navigation of the Baltic at the same period. The result is a mass of facts which are not only useful for the specialist, but also exceedingly interesting to the general reader. Among the various subjects discussed are the value of the foreign trade of Reval and other Hansa towns, the receipts from the duties, the ships used on the Baltic, the different kinds of merchandise dealt in, their prices, and the systems of weights and measures. As an example of the thoroughness of this work, it may be stated that no less than twenty-six different kinds of craft are mentioned and twenty-six pages devoted to a description of their construction, rigging, *etc.* In spite, therefore, of the apparently limited scope of the book, it contains a great deal that is of value in the study of any portion of the history of the Hansa, and is of much assistance in giving one a concrete and definite impression of that interesting and important agency in the economic development of the middle ages.

HENRY W. FARNAM.

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Handbuch der städtischen Verfassung und Verwaltung in Preussen. Für den praktischen Gebrauch gearbeitet von H. STEFFENHAGEN. Berlin, J. J. Heine. — 2 volumes, viii, 317, iv, 320 pp.

The only really successful attempt of Stein to incorporate into the law of Prussia his peculiar ideas of self-government was to be found in the celebrated municipal corporations act of 1808. Before he could prepare sufficiently his other schemes for the regeneration of the Prussian state, a decree of Napoleon drove him an exile into Russia. Not only has this act of 1808 preserved itself in its main features, but the reforms of the last fifteen years in the local government system of Prussia have been carried out on the lines it laid down. On this account nothing can be more interesting, from the standpoint of either historical or legal study, than a treatise on the municipal institutions of the state of Prussia. Such a treatise we have in this work of Mr. Steffenhagen. The two volumes of which it is composed treat each of a separate part of the subject, the first being devoted to what the author calls the constitution of the cities, the second, to their administration. Although, strictly speaking, all of the law affecting cities is a part of the administrative rather than of the constitutional law, still Mr. Steffenhagen has only followed the example set by the writers on *Staatsrecht* in endeavoring to distinguish between laws whose purpose is quite different. Thus he treats in his first volume of the territory of the city; of the city corporation; of city members and their rights and duties; and then goes on to describe the organization and procedure of the town council and executive authority. In the second volume are taken up in detail such subjects as the operations of all the authorities of the city, even the most unimportant; the municipal civil service; the rules governing the city finances and taxes; and finally the supervision which the central government of the state exercises over the actions of the municipalities. In this way, notwithstanding an apparent violation of the canons of legal nomenclature, Mr. Steffenhagen contrives to give his readers a very clear idea of the organization and the workings of the Prussian municipality.

No American reader, however, need be frightened away from this book by a fear of too much detail, nor even by the fact that its author puts upon its title page the words: "*für den praktischen Gebrauch gearbeitet.*" In this case the words cited do not mean that only those things are treated with any fulness that interest the Prussian lawyer or official: all that they can be interpreted to mean is that enough details are given to make the treatise useful to municipal officers. The book is one which will be of great value to all students interested in municipal institutions. And a study of the municipal institutions of the kingdom of Prussia will amply repay any one who undertakes it; for in them the

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attempt has been made to give to the citizen a method of government which will call the best talent into the service of the city, will encourage local spirit and pride, and will at the same time prevent the municipality from recklessly engaging in enterprises too great for its strength and overburdening itself with debts to be paid by future generations. This method may briefly be described as the granting to the municipality of very general powers, with the proviso that, for the exercise of many of them, the consent of some one of the superior administrative officers of the central government shall be obtained. As this is only granted after an investigation of the circumstances connected with the request, and as the responsibility may thus easily be fixed upon some one person, it is pretty certain that any request to do a thing which it is not proper that a municipality should do will at any rate receive a very thorough scrutiny and will probably be altogether refused. But while the Prussian law has thus established a very strict administrative control over the actions of the municipalities, it has never dreamed of granting to any central authority the same power to compel the municipality to act that is possessed and so often exercised by our state legislatures. Of course the legislature has, as with us, the right by means of special legislation to force a city to act as it sees fit. But the whole practice and feeling is against the exercise of any such powers; so that, with a system of municipal administration apparently much more centralized than that existing in many parts of this country, the Prussian cities really enjoy a much greater degree of freedom of action than is actually possessed by many of our American cities, notwithstanding our boasted local self-government. Another characteristic of the Prussian system is the more or less successful attempt to force municipal citizens into office by providing that any one who refuses to serve at least half the time for which he has been elected or appointed shall lose his municipal suffrage and have his taxes much increased. This was one of Stein's pet ideas. He hoped thus to create a greater interest in public affairs and gradually to educate a class of public spirited men, not professional office-holders, who might in time take a large part of the work of administration away from the centralized Prussian bureaucracy. Another thing to be noticed in the Prussian municipal system is the way in which the suffrage is limited. Not only is the right of voting for municipal officers and of holding municipal office dependent upon the justification of a small property qualification (which may consist simply in the payment of one of the many direct taxes), but in order to give the larger property owners greater control than they would otherwise have, the whole voting population of the city is divided up into three classes; the first class consisting of the largest tax-payers, who pay a third of all the direct taxes; the second class consisting of the next largest tax-payers, who pay the second

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third of the taxes; the third class consisting of the remaining tax-payers. Each one of these classes elects a third of the members of the town council. This system, which is somewhat similar to that adopted in the elections for the Prussian Diet (*Landtag*), is said to work very satisfactorily, and by many it is thought that to it is due the great success of the municipal government of most of the Prussian cities.

Such is the system which this work of Mr. Steffenhagen attempts to describe in detail. Not only is the attempt an eminently successful one, but Mr. Steffenhagen's book is really the only one which describes Prussian city government in a scientific manner. No one who is interested in comparative municipal administration can afford to be without it.

F. J. G.

Histoire du plébiscite. Par CHARLES BORGEAUD. I. *Le plébiscite dans l'antiquité.* Paris, E. Thorin, 1887.—8vo, xvi, 200 pp.

M. Borgeaud has set himself an ambitious task: he has undertaken to write a history of direct popular legislation from the earliest period to the present day. The first portion of his work (Greece and Rome) is admirably well done: it rests upon a thorough study of the best modern literature, German, English, French and Italian, controlled by careful examination of the sources. The bibliographical notes upon moot points will be of great value to every student of ancient history.

In his preface M. Borgeaud indicates his belief that the representative system is doomed, and that the plébiscite, in the Swiss sense, is "le terme nécessaire de l'évolution démocratique." The people are not to make constitutions only, but laws. These two forms of plébiscite (the "constituent" and the "legislative") are carefully to be distinguished from the "plébiscite, qu'on pourrait appeler *exécutif*, par lequel le souverain tranche une question de gouvernement ou d'administration"; and either of the first-mentioned forms may be admitted, "sans songer à l'exécutif." As this "executive" plébiscite (a constitutional lawyer might quarrel with this use of the adjective) has never meant anything but the approval of a *coup d'état*, it is a relief to know that this sort of plébiscite is not "the necessary goal of democratic evolution."

"The plébiscite," we are further informed, "is admissible, evidently, only where education is widely diffused among all classes"; but it is towards this "elevation of the social mean" by the enlightenment of the masses that the democratic movement of our modern civilization is tending. The development of these theories in M. Borgeaud's studies of the modern plébiscite will be awaited with interest.

MUNROE SMITH.

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